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Supreme Court of the United States

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., ET AL.,
PETITIONERS,

vs.

UNITED STATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1961
CERTIORARI GRANTED MAY 8, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., ET AL.,
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INDEX

	Original	Print
Record from the United States District Court for the Northern District of Oklahoma		
Complaint, case No. 4272	1	1
Answer of United States of America, case No. 4272	7	8
Third party complaint, case No. 4272	9	11
Answer of third party defendant, American Airlines, Inc., case No. 4272	11	13
Amended answer of American Airlines, Inc., case No. 4272	13	14
Amended answer of United States of America, case No. 4272	17	19
Statement re pleadings, case Nos. 4273 to 4285, inc.	18	20
Findings of fact, conclusions of law and judgment, case Nos. 4272 to 4285, inc.	19	20
Notice of appeal, case Nos. 4272 to 4285, inc.	21	22
Statement of points relied on, case Nos. 4272 to 4285, inc.	22	23

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 14, 1961

	Original	Print
Record from the United States District Court for the Northern District of Oklahoma—Continued		
Statement re appeal bonds	22	23
Transcript of pretrial conference proceedings, October 26, 1959	22	23
Transcript of proceedings for clarification of order, December 2, 1959	34	34
Clerk's certificate (omitted in printing)	39	38
Proceedings in the United States Court of Appeals for the Tenth Circuit	41	38
Minute entry of argument and submission (omitted in printing)	44	38
Opinion, Bratton, J.	45	39
Dissenting opinion, Murrah, Ch. J.	55	45
Judgment	59	47
Clerk's certificate (omitted in printing)	60	47
Order allowing certiorari	62	48

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4272, Civil

HARVEY BARUCK, Administrator of the Estate of ROBERT I. ZELENS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4273, Civil

CLARINE FAROUGH, individually, and for the use and benefit of JOHN ALLEN FAROUGH and MARY KAY FAROUGH, minors, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4274, Civil

BERNICE L. MAUPIN, individually, and for the use and benefit of MARIE ELLEENE MAUPIN, a minor, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4275, Civil

[fol. 2]

MARGARET J. HOWE, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4276, Civil

ELIZABETH R. CROSS, Executrix of the Estate of JOHN LELAND CROSS, JR., Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4277, Civil

THERESE B. AKIN, Executrix of the Estate of MORRIS W. AKIN, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4278, Civil

ALTHEA S. GATES, nee BERGTHOLDT, individually, and for the use and benefit of WILLIAM RANDALL GATES, a minor, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4279, Civil

RUTH JEAN CARR-HARRIS, Administratrix of the Estate of DONALD DALE CARR-HARRIS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4280, Civil

[fol. 3]

ANNA MAE O'NEAL, surviving widow of WILLIAM E. O'NEAL, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4281, Civil

MARGARET EMMA BARRON, individually, and for the use and benefit of CHARLES DONOVAN BARRON and WILLIAM BROOKS BARRON, minors, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4282, Civil

MYRA FIELDS, Administratrix of the Estate of HAROLD M. FIELDS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4283, Civil

VIRGINIA HOBSON, individually and for the use and benefit of JOHN HOBSON, DAVID HOBSON, STEVEN HOBSON, SAMMY HOBSON, and TIMOTHY HOBSON, minors, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4284, Civil

JOSEPHINE M. SCHMYSER, Administratrix of the Estate of HERMAN F. SCHMYSER, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4285, Civil

[fol. 4]

COMPLAINT (No. 4272)—Filed August 2, 1957

Comes now your complainant, Suzanne Thomas Richards, nee Wadlow, individually and for the use and benefit of Debra Sue Richards, a minor, and respectfully shows this Court:

I. Your complainant is a citizen and resident of Willard, State of Missouri, and is the widow and surviving spouse of Kurt D. Richards, deceased. There have been no administrative proceedings had upon the Estate of Kurt D. Richards, deceased. This action arises under the Federal Tort Claim Act, by Section 1346-B and 1402 B of Title 28, U. S. Code, the defendant, United States of America, a sovereign body, has consented to be sued and is suable in this Court.

II. This action is brought under the Oklahoma Wrongful Death Statutes, on behalf of your complainant. Suzanne Thomas Richards, nee Wadlow, surviving widow of Kurt D. Richards, deceased, and for the use and benefit of Debra Sue Richards, a minor daughter of Kurt D. Richards, deceased, for pecuniary damages resulting from the wrongful death of Kurt D. Richards caused by the negligence and want of care of the defendant, United States of America, as hereinafter more fully set forth.

III. Prior to and at all times hereinafter mentioned American Airlines, Inc., was a scheduled air carrier operating under a currently effective certificate of convenience and necessity, issued by the Civil Aeronautics Board, under the terms of the Civil Aeronautics Act and regulations issued thereunder, and an air carrier operating certificate issued under the Act by the Civil Aeronautics Administration. American Airlines, Inc., owns and operates a repair and maintenance depot in the City of Tulsa, in the Northern Judicial District of Oklahoma, commonly known as the American Overhaul Base of Tulsa. Among the functions of the Overhaul Base is the repair, rebuilding, overhaul and inspection of its aircraft, aircraft engines and component parts. The defendant, United States of America, under the provisions and terms of the Civil Aeronautics Act, and through the Civil Aeronauticis (sic) Administration, control, inspect and supervise the operation of the American Airlines, Inc., in the work that they perform at their overhaul base at Tulsa, in the repair, rebuilding and overhauling of their aircraft, aircraft engines and component parts. Your complainant believes, and therefore alleges, that it was the duty of the defendant, United States of America,

through its agency, the Civil Aeronautics Administration to [fol. 5] enforce the terms of the Civil Aeronautics Act, the regulations issued thereunder and to require that the work performed by American Airlines, Inc., in repairing, rebuilding, overhauling and inspection of its aircraft, aircraft engines, and component parts, complied with the terms of the Civil Aeronautics Act and all existing regulations of the act and Civil Aeronautics Administration. In addition to the enforcement of the Civil Aeronautics Act and the regulations thereunder, it was the duty of the defendant, United States of America, through the Civil Aeronautics Administration to see that American Airlines, Inc., complied with all manufacturers requirements on the equipment they used, and to see that the system and method used by American Airlines, Inc., in the repair, rebuilding, overhaul and inspection of its aircraft, aircraft engines and component parts was safe and provided the necessary inspection to insure that all aircraft, aircraft engines or component parts thereof were airworthy after repair or rebuilding.

IV. That for a long time prior to August 4, 1955, American Airlines, Inc., was engaged in unsafe practices in repair, rebuilding, overhauling and inspection of its aircraft, aircraft engines and component parts, particularly in regard to the inspection, repair and overhaul of aircraft engines and the cylinders therein. That the defendant, United States of America, through its agency, the Civil Aeronautics Administration, and their personnel station at the American Airlines Overhaul Base, knew, or by the exercise of ordinary care should have known of these unsafe and negligent practices; that the defendant, United States of America, through its agency, Civil Aeronautics Administration, had a positive duty under the Civil Aeronautics Act to correct these practices, that despite this duty they negligently failed to correct said unsafe practices, they negligently failed to enforce the terms of the Civil Aeronautics Act and the regulations thereunder which prohibited the practices then being used by American Airlines, Inc., in the overhaul depot of Tulsa, Oklahoma; they negligently failed to see that the work being done by the personnel of American Airlines, Inc., adhered to the highest degree of care

necessary to insure the safety of the traveling public, and they negligently failed to see that the system and methods used by the American Airlines Inc., in the repair, rebuilding, overhaul and inspection of its aircraft, aircraft engines and component parts were safe and provided the necessary inspection to insure the airworthiness of the repaired or rebuilt aircraft, aircraft engines and component parts. Complainant believes, and therefore alleges, that the United States of America, through its agency, the Civil Aeronautics [fol. 6] Administration had a duty to the public generally, and to your complainant's decedent particularly, to see that the work done by the American Airlines Overhaul Base was done in compliance with the terms of the Civil Aeronautics Act and the regulations issued pursuant thereto, as failure to so comply would result in danger to those persons traveling upon American Airlines airplanes.

V. Complainant alleges that as a result of the negligence and failure of the United States of America a cylinder which should have been condemned and scrapped as unfit and unworthy to be used in the operation of an airplane engine, was removed from one engine, overhauled and placed in another engine and installed as an integral part of a Convair 240 Airplane, known as American Airlines Aircraft N94221.

On August 4, 1955, American Airlines, Inc. dispatched Convair 240 Airplane, N-94221, as Flight 476, on a scheduled Field, New York, with intermedicate (sic) stops enroute. That your complainant's decedent was a passenger for hire lawfully aboard said airplane, having duly paid his fare. That said airplane, while enroute from Springfield, Missouri to St. Louis, Missouri, crashed in the vicinity of Fort Leonard Wood, Missouri, at approximately 12:23 p.m., as the result of an uncontrollable fire in the engine caused by the failure of the defective and unairworthy cylinder which had been installed therein, as a result of the negligence, carelessness and want of care of the defendant, United States of America, by and through its agency, Civil Aeronautics Administration and the personnel connected therewith.

VI. Complainant alleges that the crash and death of her decedent was caused by the negligence of the United States

of America, its agents, servants, and employees in and about its control, supervision, of the repair, rebuilding, overhauling and inspection of said aircraft, its engines and component parts at the American Airlines Overhaul Base at Tulsa, Oklahoma, as heretofore set out, and was due to no fault or lack of care on the part of the complainant's decedent.

VII. Complainant alleges that at the time of his death, Kurt D. Richards was 34 years of age with a life expectancy of 36.59 years and at the time of his death was the sole support of Suzanne Thomas Richards nee Wadlow and Debra Sue Richards. That as a result of the carelessness, negligence and want of care of the defendant, as heretofore [fol. 7] set out, Suzanne Thomas Richards nee Wadlow and Debra Sue Richards have been deprived of the love, affection, guidance, companionship and support of the deceased, Kurt D. Richards, deceased, and as a result thereof has been damaged in the sum of $300,000.00.

Wherefore, complainant demands judgment against the defendant in the sum of $300,000.00, together with the costs of this action.

Speiser, Smith & O'Brien, Rucker, Tabor & Cox,
By Joseph A. Sharp, Attorneys for Complainant.

IN UNITED STATES DISTRICT COURT

ANSWER OF UNITED STATES OF AMERICA (No. 4272)
—Filed November 22, 1957

Comes now the United States of America, by B. Hayden Crawford, United States Attorney, and Russell H. Smith, First Assistant U.S. Attorney, for the Northern District of Oklahoma, and for its answer to the complainant herein states and alleges that:

First Defense.

1. It is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph I of the complaint except that, as to the averment contained

therein that this action arises under the "Federal Tort Claims Act," it admits that in appropriate circumstances this defendant would be subject to suit under the provisions of said Act, but denies that any action against this defendant arises from the facts here involved.

2. It is without knowledge or information sufficient to form a belief as to the truth of averments in paragraph II, except that it denies that the death of Kurt D. Richards was caused by any negligence or want of care of this defendant.

3. With respect to averments contained in paragraph III of the complaint, this defendant admits the averments contained in the first three sentences of said paragraph. It ad- [fol. 8] mits that the Civil Aeronautics Administration had certain duties pertaining to the inspection of the operations of American Airlines, Inc. in the repair, rebuilding, and overhauling by American Airlines, Inc. of its aircraft, aircraft engines and component parts, which duties are prescribed by pertinent statutory and regulatory provisions to which reference is hereby made. It denies each and every other averment in said paragraph.

4. With respect to the averments contained in paragraph IV of the complaint, it is without knowledge, or information, sufficient to form a belief as to the truth of the averments contained in the first sentence of said paragraph; and it denies each and every other averment in said paragraph.

5. With respect to the averments contained in paragraph "V" of the complaint, it admits that the airplane described therein was, on August 4, 1955, on the operation therein described, and that said airplane crashed at or about the time and place therein alleged. It is without knowledge or information sufficient to form a belief as to the truth of the averment that the decedent was a passenger for hire lawfully aboard said airplane. It denies each and every other averment contained in said paragraph.

6. It denies each and every averment contained in the paragraph designated "VII" on the complaint, except that it states that it is without knowledge or information sufficient to form a belief as to the truth of the averment that

said crash was due to no fault or lack of care on the part of the said decedent.

7. It is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph designated "VIII" of the complaint, except that it denies that any damage, which may have been suffered by the plaintiffs or other persons named in said paragraph on account of the death of the decedent, resulted from any carelessness, negligence or want of care of this defendant.

Second Defense.

8. This Court does not have jurisdiction in this action for the reason that the acts alleged in the complaint do not constitute a claim for which the United States, if a private person, would be liable to the plaintiffs or would have been liable to the plaintiffs' decedent in accordance with the law of the place where the alleged carelessness, negligence or want of care of this defendant occurred.

[fol. 9]

Third Defense.

9. This Court does not have jurisdiction in this action for the reason that any claim by the plaintiffs or any claim which the plaintiffs' decedent might have had against the United States based upon the facts alleged in the complaint would fall within the exceptions to the jurisdiction of this Court set forth in paragraph (a) of Section 2680 of Title 28, United States Code.

Fourth Defense.

10. The averments contained in the complaint fail to state a claim against this defendant upon which relief can be granted.

Wherefore, the defendant, United States of America, prays that the action herein against it be dismissed, together with its costs and disbursements as against the plaintiffs, and for such other and further use as may be just and proper.

B. Hayden Crawford, United States Attorney, Russell H. Smith, First Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

THIRD-PARTY COMPLAINT (No. 4272)
—Filed November 22, 1957

I. Plaintiff, Suzanne Thomas Richards, nee Wadlow, individually, and for the use and benefit of Debra Sue Richards, a minor, has filed against defendant, United States of America, a complaint, a copy of which is attached hereto as Exhibit A.

II. American Airlines, Inc., hereinafter styled third-party defendant, is a corporation chartered under the laws of the State of Delaware, but having a permit to do business in the State of Oklahoma, and having an agent in Oklahoma City, Oklahoma County, Oklahoma, upon whom process may be served.

III. It has been alleged in plaintiff's original complaint that the deceased, Kurt D. Richards, was a passenger on [fol. 10] American Airlines Flight 476 on August 4, 1955, and killed when that aircraft crashed near Fort Leonard Wood, Missouri, on that date.

IV. In plaintiff's original complaint, it is further alleged that such crash and the resultant death of Kurt D. Richards were caused by a defective cylinder, which had been installed in the right engine of the aircraft at the time when it was overhauled at the American Airlines maintenance and overhaul base at Tulsa, Oklahoma. It is alleged specifically in said complaint that the agents of the United States Government were negligent in failing to require American Airlines, Inc., to inspect, maintain, and repair properly the airplane, which crashed, and in allowing American Airlines, Inc., to install such defective cylinder.

V. American Airlines Flight 476 was a Convair Model 240 aircraft, Identification No. N-94221, which was owned by and under the sole operational control of American Airlines, Inc. at the time of the flight that terminated in the crash.

VI. American Airlines Flight 476, on August 4, 1955, was a flight operated by American Airlines, Inc., in schedules

interstate air transportation and subject to the provisions of Part 40 of the Civil Air Regulations (14 CFR Part 40, promulgated by the Civil Aeronautics Board).

VII. Under the provisions of Section 40.240 of the Civil Air Regulations (14 CFR 40.240), which was in force and effect on August 4, 1955, and is now in force and effect, American Airlines, Inc., had the primary responsibility for the airworthiness of its airplanes and their required equipment.

VIII. Any maintenance performed on aircraft N-94221, operated as American Airlines Flight 476 on August 4, 1955, including any overhaul of the right engine thereof, was performed by American Airlines, Inc., its agents, or employees.

IX. No maintenance work on aircraft N-94221, or its component parts, including the right engine installed therein, was performed by any agent or employee of the United States of America.

X. If the crash of American Airlines Flight 476, on August 4, 1955, in fact resulted from a defective cylinder, which had been negligently installed in the right engine thereof, the negligent act or omission was that of American Airlines, Inc., whose employees overhauled the cylinder [fol. 11] and installed the engine, and not of the United States of America.

XI. Without admitting that, upon the occasions referred to in plaintiff's original complaint, this defendant and third-party plaintiff, United States of America, acting through its servants, agents, and employees, was negligent, but expressly denying such negligence on the other hand, this defendant and third-party plaintiff, United States of America, would show such negligence, if any as may be found herein to have been committed by this defendant and third-party plaintiff upon said occasions, was passive, and the active and primary negligence upon any such occasion was committed by the third-party defendant, American Airlines, Inc., and this defendant and third-party plaintiff, United States of America, is entitled to recover against

the third-party defendant, American Airlines, Inc., as indemnitor, any such amount as may be adjudged in favor of plaintiff and against the United States as damages on account of such negligence.

Wherefore, the defendant and third-party plaintiff, United States of America, demands judgment against third-party defendant, American Airlines, Inc., for all sums of money that may be adjudged against defendant and third-party plaintiff, United States of America, in favor of plaintiff, Suzanne Thomas Richards, nee Wadlow, individually, and for the use and benefit of Debra Sue Richards, a minor.

B. Hayden Crawford, United States Attorney, Russell H. Smith, First Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER OF THIRD PARTY DEFENDANT (No. 4272) —Filed March 28, 1958

For its answer to the complaint of the third party plaintiff and for answer to the complaint of Suzanne Thomas Richards, complainant, American Airlines, Inc., states:

[fol. 12]

First Response.

The third party complaint does not state a claim against American Airlines, Inc., in favor of the United States of America upon which relief may be granted.

Second Response.

The complaint does not state a claim against United States of America in favor of the complainant upon which relief may be granted.

Third Response.

In consideration of the payment to her by American Airlines, Inc., and on its behalf, of the sum of Fifteen Thousand Dollars, the complainant on or about the 18th day of November, 1955, executed and delivered to American Airlines, Inc.,

a full and complete release acknowledging satisfaction of all claims on account of the death of Kurt D. Richards arising out of the accident of August 4, 1955, by virtue of which complainant is barred from the maintenance of this action.

Fourth Response.

The allegations of the following paragraphs of the third party complaint are admitted: Paragraphs I, II, III, IV, V, VI, VIII, and X; each and every other allegation of the third party complaint is denied.

Fifth Response.

That the alleged acts of negligence as set forth in the complaint and attributed to the defendant—third party plaintiff, if any, became operative in the State of Missouri in that the accident, referred to in the complaint, resulting in the death of Kurt D. Richards, occurred within the State of Missouri.

W. B. Patterson, Fred M. Mock, By Fred M. Mock,
Attorneys for Third Party Defendant.

Jury Trial Demanded.

[fol. 13] Pierce, Mock & Duncan

In United States District Court

Amended Answer of American Airlines, Inc. (No. 4272)
—Filed August 29, 1959

For its answer herein, American Airlines, Inc., states:

First Response.

The complaint does not state a claim against the United States of America in favor of the complainant upon which relief may be granted.

Second Response.

The third party complaint does not state a claim against American Airlines, Inc., in favor of the United States of America upon which relief may be granted.

Third Response.

The allegations of the following numbered paragraphs of the third party complaint are admitted: Paragraphs I, II, III, IV, V, VI, VIII, and IX; each and every other allegation of the third party complaint is denied.

Fourth Response.

The death of complainant's decedent became actionable, if at all, under the laws of the State of Missouri. R. S. Mo. 1939, Sec. 537.080:

> "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

[fol. 14] 1. The cause of action of the complainant against the United States of America accrued on August 4, 1955, and said cause of action no longer existed after August 4, 1956. R.S. Mo. 1939, Sec. 537.100:

> "Every action instituted by virtue of Sections 537.070 to 537.090, 537.110 and 537.260, shall be commenced within one year after the cause of action shall accrue; * * *"

2. The complainant is, in any event, limited to a recovery of fair and just damages, not exceeding $15,000.00. R.S. Mo. 1945, Sec. 537.090:

> "Damages accruing under Section 537.080 shall be sued for and recovered by the same parties and in the same manner as provided in Section 537.070; and in every such action the jury may give such damages, not exceeding $15,000.00, as they deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be en-

titled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

3. The complainant is not the real party in interest. R.S. Mo. 1939, Sec. 537.070:

"1. Whenever any person, including any employee of the corporation, individual or individuals herein referred to whose death is caused by the negligence of a co-employee thereof, shall die from any injury resulting or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or any street electric or terminal car or train of cars, or of any master, pilot, engineer, agent or employee whilst running, conducting or managing any steamboat, or any of the machinery thereof, or of any driver of any stagecoach, automobile, motorcar or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, whether the same be a steam, street, electric or terminal car, or in any steamboat, or the machinery thereof, or in any stagecoach, automobile, motorcar, or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns, operates or conducts any such railroad, locomotive, [fol. 15] car, street car, electric car, terminal car, automobile, motorcar, stagecoach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence, or criminal intent above declared, or any such officer, agent, servant, employee, master, pilot, engineer or driver, whose negligence, unskillfulness, or criminal intent shall cause such injury, shall forfeit and pay as a penalty for every such person, employee or passenger so dying, the sum of not

less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for and recovered:

(1) By the husband or wife of the deceased; or

(2) If there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased; provided, that if adopted, such minor child or children shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption; or

(3) If such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or

(4) If there be no husband, wife, minor child or minor children, natural born or adopted as herein indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent, and such corporation, individual or individuals or such officer, servant, agent, employee, master, pilot, engineer, or driver, may show as a defense that such death was caused by the negligence of the deceased."

[fol.16]

Fifth Response.

Negligence of the United States of America, which is not admitted and is specifically denied, was not a proximate

cause of the accident, and the complainant is accordingly barred from recovery of any damages against defendant United States of America.

Sixth Response.

At all times stated in the complaint defendant United States of America was wholly engaged in its sovereign, governmental functions from which it is immune to civil tort liability and the complainant is accordingly barred from recovery of damages. 28 U.S.C. § 2680:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Seventh Response.

The death of complainant's decedent was an unavoidable casualty in that it was not proximately caused by the negligence of the complainant, her decedent, or the United States of America.

Eighth Response.

In consideration of the payment to her of the sum of $15,000.00, on or about the 18th day of November, 1955, in the State of Missouri, the complainant executed and delivered to American Airlines, Inc., a full and complete release acknowledging satisfaction of all claims on account of the death of Kurt D. Richards arising out of the accident of August 4, 1955, by virtue of which, under the laws of the State of Missouri, complainant is barred from maintaining this action against defendant United States of America.

[fol. 17] W. B. Patterson, Fred M. Mock, Melvin F. Pierce, Pierce, Mock & Duncan, By Melvin F. Pierce, Attorneys for American Airlines, Inc.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF UNITED STATES OF AMERICA (No. 4272) —Filed February 9, 1959

Comes now the United States of America, by Russell H. Smith, First Assistant United States Attorney for the Northern District of Oklahoma, and files this amendment to its answer. The answer of defendant, United States of America, filed November 22, 1957, is incorporated by reference herein and made part hereof as if herein fully repeated.

I. The death of complainant's decedent was, as to the defendant, United States of America, an unavoidable casualty in that it was not proximately caused by the negligence of the complainant, her decedent, or the United States of America.

II. In consideration of the payment to her of the sum of $15,000 on or about November 18, 1955, in the State of Missouri, the complainant executed and delivered to American Airlines, Inc. a full and complete release acknowledging satisfaction of all claims on account of the death of Kurt D. Richards arising out of the accident of August 4, 1955, by virtue of which complainant is barred from maintaining this action against defendant, United States of America.

III. If the execution and delivery of the release hereinabove described does not have the effect of completely releasing defendant, United States of America, the amount of the consideration, for which the release was delivered, should be taken into account by way of mitigation of any damages, if any, which might be assessed against the United States of America.

Russell H. Smith, First Assistant United States Attorney.

Consent for filing: Speiser and O'Brien, Rucker, Tabor & Cox, By Joseph A. Sharp, Attorneys for complainant.

[fol. 18]

IN UNITED STATES DISTRICT COURT

STATEMENT RE PLEADINGS, ETC.

The pleadings in causes numbered 4273, 4274, 4275, 4276, 4277, 4278, 4279, 4280, 4281, 4282, 4283, 4284 and 4285 are identical with the pleadings in cause No. 4272 except as to parties and amounts, but insofar as they relate to the issue presented on appeal, are in fact identical and the court's decision based on the pleadings filed in cause No. 4272 is determinative of all the issues in all the cases filed herein.

• • • • • • •

[fol. 19]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT (ALL CAUSES)
—Filed January 18, 1960

In accordance with the stipulations heretofore entered into between the parties, the Court finds as follows:

[fol. 20] I. That the suits by plaintiffs against United States of America allegedly arise under the terms of the Federal Tort Claims Act, 28 U.S.C. 1346 et seq. and allegedly are brought under the Oklahoma Wrongful Death Statute, to wit: 12 O.S. Sec. 1051, et seq.

II. That, in the actions brought by plaintiffs against American Airlines, there is diversity of citizenship between the parties.

III Convair Airplane 240, registration No. N-94221, was owned and operated by American Airlines and, on the 4th day of August, 1955, was being operated by American Airlines as Flight 476 when it crashed at Fort Leonard Wood, Missouri.

IV. That, at the time of the crash, the airplane was being operated by Captain Hugh Barron, as pilot, and William Grover Gates, as co-pilot. That Hugh Barron and William Grover Gates were employees of American Airlines at the time of the crash and were fatally injured as a result of the crash.

V. That Harold M. Fields, Morris W. Akin, Kurt D. Richards, Samuel H. Hobson, Robert I. Zelens, John Leland Cross, Jr., James Howe, Wayne Howe, Donald L. Carr-Harris, Virgil D. Maupin, Tilson J. Farough, Herman F. Schmyser and William E. O'Neal were all fare paying passengers, lawfully aboard American Airlines Flight 476, and all perished in the crash occurring at Fort Leonard Wood, Missouri.

VI. That the death of the crew members and all fare paying passengers occurred within the State of Missouri.

VII. That plaintiffs allege negligence on the part of the United States of America, occurring prior to the 4th day of August, 1955, at the American Airlines Overhaul Depot located at Tulsa, Oklahoma, which they allege was the proximate cause of the crash and deaths of the members of the crew and fare paying passengers.

VIII. That plaintiffs have received full satisfaction of any cause of action they may have under the terms and provisions of the Wrongful Death Statute of the State of Missouri.

CONCLUSIONS OF LAW (ALL CAUSES).

In accordance with the above Findings of Fact, the Court determines as follows:

I. The Court has jurisdiction of the parties and the subject matter of these actions.

II. In the actions by plaintiffs against the United States of America, the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) et seq. are applicable.

[fol. 21] III. It is unnecessary to decide whether the law applicable to the plaintiffs' claims against the United States of America is that of the State of Missouri or the State of Oklahoma, for in either case the plaintiffs have no actionable claims against the United States of America.

IV. There is no cause of action under the Oklahoma Wrongful Death Statute where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri.

V. If Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including its conflicts of law rule, is applicable thereunder.

VI. The Oklahoma conflicts of law rule requires that in the circumstances of these cases the plaintiffs' claims be determinable by reference to the Missouri Wrongful Death statute.

VII. The plaintiffs have no further claims under the Missouri Wrongful Death Statute for the reason that they have already received full satisfaction of any claims they might have thereunder.

VIII. The complaints in the above action should be dismissed with prejudice.

IX. Since the complaints against the United States are to be dismissed, it is unnecessary to pass upon the third party complaints asserted by the United States against American Airlines.

ORDER OF JUDGMENT (ALL CAUSES).

In accordance with the above findings of fact and conclusions of law, the complaints in the above actions are hereby dismissed with prejudice.

Royce H. Savage, Judge.

Approved: Speiser, Quinn & O'Brien, Rucker, Tabor & Cox, By Joseph A. Sharp, Attorneys for Plaintiffs: Rhodes, Crowe, Hieronymus & Holloway, By Attorneys for Intervenor, Robert Rizley, as to form, By Russell H. Smith, Attorneys for United States of America; Pierce, Mock & Duncan, Couch & Hendrickson, Jackson, Walker, Winstead, Cartwell & Miller, By W. B. Patterson, Attorneys for American Airlines, Inc.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL (ALL CAUSES)—Filed March 15, 1960

Notice is hereby given that plaintiff-appellant appeals against the United States of America, defendant-appellee,

[fol. 22] to the United States Court of Appeals for the Tenth Circuit from the Order of Dismissal entered on the 18th day of January, 1960.

Joseph A. Sharp, Attorney for Appellants.

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IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS (ALL CAUSES)—Filed March 15, 1960

The points upon which appellants will rely on appeal are:

1. The court erred in dismissing the complaints of the appellants.

Joseph A. Sharp, Attorney for Appellants.

STATEMENT RE APPEAL BONDS

Appeal bonds were filed March 15, 1960.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PRE-TRIAL CONFERENCE PROCEEDINGS —October 26, 1959

Be It Remembered, that on the 26th day of October, A.D., 1959, in the above-designated Court, sitting at Tulsa, Oklahoma the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for further pretrial conference, and with it seventeen other cases involving the same circumstances.

The plaintiffs were present and represented by Joseph A. Sharp, Esq., Attorney and Counselor at Law, of Tulsa, Oklahoma.

The United States of America was present and represented by Robert S. Rizley, Esq., U. S. Attorney, and by Russell H. Smith, Esq., Assistant U. S. Attorney for the Northern District of Oklahoma, and by Harry Stein, Esq., Department of Justice, Washington, D.C., and By W. A.

Crawford, Esq., F.A.A., Washington, D.C., all Attorneys and Counselors at Law.

And, thereupon, the following proceedings were had, to wit:

The Court: Do you have the appearances, Mr. Reporter?

(The reporter responded that he did not; and the following appearances were entered:)

[fol. 23] Mr. Pierce: Fred Mock, Melvin Pierce, and Mr. Patterson, for the defendant American Air Lines.

Mr. Smith: Robert S. Rizley, Russell Smith, Harry N. Stein, aof [sic] the Department of Justice, and W. A. Crawford, F.A.A. Agency, for the United States of America.

The Court: Joe, it looks like you are badly out-numbered this morning.

Mr. Sharp: Been that way ever since we started.

The Court: And you seem to have the judge of the Court causing you trouble too. What do you have to say for yourself this morning?

Mr. Sharp: "Ouch!" Judge—

The Court: Do I have you in the corner yet?

Mr. Sharp: I don't know how much point there is in arguiing [sic] this thing. It looks to me like, from your letter, you plan to follow Mr. Patterson's theory on this matter, which, as I see Mr. Patterson's position, he is either questioning the Union Trust Company case, or the like, or contends that it doesn't have the interpretation we put on it. And if it doesn't have the interpretation we put on it, you are right, that's all.

The Court: Well, it goes beyond that. Actually my decision is not based on the question involved in the Union Trust case or the Hess case,—I say, "my decision"—I haven't decided yet, except I have made up my mind and I have indicated to you what I propose to decide,—

Mr. Sharp: Yes, sir.

The Court: On that issue. And I am assuming that—In other words, I just pass the question that is now pending before the Supreme Court in the Hess case.

Mr. Sharp: Yes, I appreciate that.

The Court: But, in any event, I think the Oklahoma law applies.

[fol. 24] Mr. Sharp: But also in applying the Oklahoma law, you also have to apply the Oklahoma conflicts rule.

The Court: Apply the Oklahoma conflicts rule; and when we do that, we apply the Missouri law, with the limitations included in the statutory relief provided under the Missouri law, which limits recovery to—

Mr. Sharp: $15,000.

The Court: $15,000.

Mr. Sharp: Well, I understood that was your reasoning. Which is contrary to our hoped-for interpretation of the Hess case, in that the Government—in the Eastern Air Lines case—actually there were two verdicts rendered, one for $15,000 against the Government under the Virginia law, and one for $60,000 against American Air Lines under the District of Columbia law. At least, it is our interpretation, Judge, and it may be wrong, that—at least the Circuit Court in the District of Columbia felt that when the Government waived its immunity to suit they could lay any requirements upon that immunity, and could—and apparently did. I don't know how the Government could say, "You will apply the law of the State and you will not follow the conflicts of law rule." There is no way to reconcile that Eastern Air Lines decision, in view of the two verdicts, in my mind, with the rest of the cases. Apparently, as the Government, they applied the internal law of Virginia in an accident that the court found happened in the District of Columbia; and they have held that the limitation of Virginia was against the Government, even though it was outside of Virginia, on the ground that the remission charge against the Government—in other words, they awarded damages against the American Air Lines in the sum of $60,000 in the District of Columbia. That is my understanding of the case. Every time I read it I get more confused—the basis of that is what came out of that decision. It seems to me impossible. In my experience in Denver you could never have any problem like that in a case without the Circuit Court asking somebody about it at some time. It seems to me it is a case standing by itself. But what seemed to be the interpretation they have put on it; and in that case I don't think there is any escape from the

fact that as against the Government they applied the Virginia limitation on an accident that the Court found happened outside of Virginia—happened in the District of Columbia. Therefore they limited recovery on the Govern- [fol. 25] ment for $15,000, and awarded damages against the American Air Lines for a greater sum—or Eastern Air Lines. And that's the problem that we have wrestled with ever since we have had this case.

The Court: What do you suggest as to further procedure?

Mr. Sharp: Well, Judge, this is just a thought that came to my mind—I don't know whether it is feasible, or not: but if that is the feeling of Your Honor, that you have to apply the Missouri law, and therefore the limitations come up, then at least it is my thought that where we have agreed to a settlement for $15,000, although we have an excuse we have no right to further damages against the Government because it has been paid. And my suggestion would be this: It is my thought you take one of those cases—and I am sorry that right now I can't think of one of them, but we have admitted in the interrogatories those that have been settled—

Mr. Patterson: Six of them.

Mr. Sharp: I think you take any one of those and order a dismissal of that lawsuit on the ground there could be no recovery because the money has been paid, and we could take an appeal on that as to the legal questions, with the stipulation that the final effect of that appeal will apply to all of these cases, because if Your Honor's position is sustained, quite frankly they have an agreement worked in the other American Air Lines cases—

Mr. Patterson: Judge, we are prepared in the four other cases where there is a direct action against American Air Lines—I believe one of them, to tender into the Court, the $15,000 maximum benefits under the Missouri law, which would put them in the same shape that the six we have already paid in. Now, there are two other cases which are employe cases of American Air Lines where compensation has been paid. Now, I don't know what the amount of the benefits are, and I further don't know what the law of Oklahoma is with reference—

Mr. Sharp: It is an exclusive remedy; I think there is no problem there.

Mr. Patterson: With reference to the subrogation on those two cases I am not clear at all, but I think as to all of the cases other than the two employe cases with our payment of $15,000 that it could result in just simply an order of dismissal.

[fol. 26] Mr. Sharp: At least that was my thought, Judge, which would be less burdensome. We would like, however, for Your Honor to make the necessary findings of fact and conclusions of law upon which we would appeal, which would include these problems, so we would have it resolved once and for all. To me, Judge, I think that would be less trouble for the Court and it would confine our area to the legal area. I will be quite candid, Your Honor, if that is the law we are through with these lawsuits.

The Court: What do you suggest, Mr. Stein, if anything?

Mr. Stein: Well, it seems to me that that wouldn't be an unreasonable way to handle it. I expect that Mr. Patterson's proposal is also satisfactory to you.

The Court: These cases are consolidated.

Mr. Patterson: Rather than the Court making findings of fact, I think we can stipulate on the facts. I don't believe there are any controverted facts which would relate to this particular issue.

Mr. Sharp: That's right.

Mr. Patterson: We can stipulate the doggoned thing happened in Missouri and all of the other facts which would be necessary.

The Court: Well, I think the Court should make findings of fact, however, based on your stipulation—prepare findings of fact and conclusions of law.

Mr. Patterson: The burden ought not to be put on the Court.

Mr. Sharp: I think as far as the legal ramifications of this action, the facts have already been admitted to the Court.

Mr. Patterson: I think they have.

Mr. Stein: For whatever it is worth, I believe you are aware of the fact that the Hess case was argued in the Supreme Court a couple of weeks ago.

The Court: Yes, sir.

Mr. Stein: I don't necessarily say that would dispose of anything, but that may be coming down with an opinion in a couple of weeks.

[fol. 27] The Court: Well, if the Hess case is affirmed that would dispose of your appeal, I think.

Mr. Stein: That's right—I mean, it depends on what they say, of course.

The Court: If it is reversed I think I still have to hold the way I do.

Mr. Stein: It depends on the basis for the affirmance if it is affirmed. They could affirm on the factual aspects of the case without even reaching this question; but it could depend on the language of the Court. We just don't know, obviously.

The Court: No. Well, the reason I decided not to await the decision of the Hess case was because I was of the view after I studied these briefs that any way the Hess case may be decided, I have got to hold that the Missouri law applies. I was of the opinion that there isn't anything that the Supreme Court could say in the Hess case that would justify the conclusion by the Court in this case that the Missouri law is applicable.

Mr. Stein: Well, as I say I won't try to predict what the Supreme Court might say; even in passing that they sometimes have a way of make observations which are significant. The Government's position in the Hess case on the argument to the Supreme Court was to the effect that this basic Eastern Air Lines question really wasn't significant, which was essentially the position we took in opposing the petition for a writ. And I might say that I wasn't able to be present at the argument. I tried very much to be present to see how the wind seemed to be blowing and I couldn't get there. But I was told that there was some brief reference to the Union Trust Company problem, but they didn't spend nearly as much time on that as they did on the other aspects of the case, the applicable law, complications, and so on. So I just wouldn't dare to even attempt to predict on what the opinion would say or whether it would throw any light on this question one way or the other.

Mr. Patterson: Well, I certainly feel that it wouldn't throw any light on whether or not the Oklahoma wrongful-death statute gives any cause of action for a death which occurs outside of the State of Oklahoma. I just can't conceive of anything the Court might be able to say or not say which would be binding on this court in attempting—these are suits filed here under the Oklahoma wrongful-death statute—

[fol. 28] The Court: Yes.

Mr. Patterson: If this Court feels that the Oklahoma wrongful-death statute does not give a cause of action for death which does not occur in the State of Oklahoma, then that is this court's interpretation of—

The Court: Well, that's the way I feel about it, as indicated in my letter. Certainly the Supreme Court is not going to pass on the Oklahoma law in the Hess case.

Mr. Patterson: I don't think they are either.

Mr. Stein: Of course I might say, in the interest of possibly clarifying one aspect of this problem, that while it is true that in the Union Trust Company case the Court of Appeals did not specifically touch on this problem which is in a sense a subsidiary problem to the basic problem, the question was in a sense presented to them in the briefs. Now, for whatever they may be worth I thought it might be valuable to bring the briefs along with me. It is true that in connection with the petition for reconsideration, which was the basis for this opinion we are talking about, the plaintiff did raise precisely the point that Mr. Sharp and Mr. Patterson are raising, so that it was before the Court. Now why the Court didn't specifically touch on that, I just don't know. It may be because there was some confusion, as a matter of fact as to where the deaths did occur—where the impact did occur. As you recall it, some parts of the plane fell in the District of Columbia, and other parts of the plane fell in Virginia; and it may be that for that reason they didn't reach the question. But it may be also that the Court thought this might be a distinguishable situation because none of the Virginia cases that were cited in support of the proposition dealt with precisely this kind of a situation. In other words, a wrongful act occurring in one place as distinguished from

where the impact occurred, and so on. I just don't know. But this kind of problem, I think I should say, was before the Court at least in the form of the briefs. And the Government did take the position that there was no contrast problem in the case, that is, that the Virginia wrongful death statute was the applicable statute. Nevertheless it is true that the opinion did not touch on it one way or the other. We regard this as by no means an open-and-shut basis, even on the basis of the Union Trust Company case.

The Court: Well, I agree with that statement. I don't think it is an open-and-shut case. But I feel very strongly [fol. 29] that the conclusion that I reach here is the logical conclusion to reach under Oklahoma law. And I might as well go ahead and do it. I believe the thing to do is to enter judgment in all of these cases in which—which are ready for entry of judgment. Now, let's see which ones they are.

Mr. Patterson: Will you tell from your list which ones are direct actions against us?

Mr. Pierce: Just in the four cases, 4542, 4546, 4583 and 4584 the American Air Lines is the sole party defendant.

Mr. Patterson: We are defendants along with the Government, but we have been directly—oh, they were consolidated; that's right—that's right, they were consolidated.

Mr. Pierce: They have been consolidated with other actions against the United States by the same plaintiffs.

The Court: Well, consolidated for trial only.

Mr. Pierce: The four cases against the Government by the same plaintiffs are 4277, 4278, 4280, and 4283.

The Court: Well, now, wait just a moment. In the four cases just mentioned against the American Air Lines, you tender $15,000 in each of the cases to the plaintiffs?

Mr. Patterson: Yes.

The Court: Which is the maximum sum recoverable under the Missouri wrongful-death statute.

Mr. Patterson: Yes, sir.

The Court: And—

Mr. Patterson: That will take care of eight of the cases as they now appear on the docket. Now, there are six other cases.

The Court: Uh huh.

Mr. Patterson: Where we have already paid.

[fol. 30] The Court: All right, let me have those.

Mr. Pierce: 4272, 4273, 4275, 4276, 4281 and 4284.

Mr. Sharp: Just— Judge, let me just interject this: I don't see how, in my own mind, Mr. O'Brien has worked it out. One of those was settled on a covenant—

Mr. Patterson: $15,000 was paid her; it was settled on a covenant was what it was settled on.

Mr. Sharp: There was some mix-up, though, as to what the covenants were. To me it doesn't impose a problem—

The Court: Yes.

Mr. Sharp: I am inclined to agree with Mr. Patterson if he thinks—

Mr. Patterson: $15,000 is $15,000.

Mr. Stein: I don't know that the question of what kind of a document it is is crucial. The important thing is how much money you get—and you can't get paid twice.

The Court: I understand where you have a covenant not to sue joint tort feasors you would fix the amount of recovery and deduct the amount; but when you do that fifteen and fifteen would be the same.

Mr. Sharp: That is my way of thinking. Maybe they have a different way of thinking back in New York.

Mr. Patterson: That leaves four cases.

The Court: That leaves four, or three?

Mr. Patterson: Four, 4279, 4282—those two cases are brought by the next of kin of employees of American Air Lines.

The Court: 3279 and 4282.

Mr. Patterson: Yes, sir. And in 4274 and 4285, they stand on a footing by themselves. I think suits are pending elsewhere directly against American Airlines, is what I think.

[fol. 31] Mr. Sharp: You may well be right. It seems to me that all of these—we don't undertake to represent people in direct suits against American Air Lines; you see we had enough problems as it was.

The Court: Yes.

Mr. Sharp: It seems to me that I had understood, however, that Mr. Patterson is right; that their cases had all

been settled or there were actions pending. I can verify that by this afternoon and let Your Honor know.

Mr. Patterson: Of course it won't be material to this court about that because the action here is simply against the Government and that will fall in the class of cases where the Court will just hold that the Missouri law is applicable, whether they sued the Government or whether they sued the American Air Lines.

Mr. Sharp: However, again, I am willing to stipulate, whatever the Circuit Court holds, or whoever finally decides this issue says the law is, it will be applicable to that case as far as I am concerned and as far as plaintiffs are concerned. I might, for the purposes of this, however, find out if there are suits pending and make the same tender in that Court, which, again, if that is made, would give Your Honor the right then to proceed on those cases as you do here on these.

Mr. Patterson: As soon as we get through here I am going to call New York and get, absolutely, the status of this. I wrote them last week but they didn't see fit to let me know.

The Court: What about the two cases in which employees of American Air Lines were involved?

Mr. Patterson: Well, as I understand, from talking to my lawyers up here, under the Oklahoma Compensation Act there is no right of subrogation.

Mr. Sharp: That's right.

Mr. Patterson: But the employees would be precluded from recovering against American Airlines because they have received compensation. So I think it—if it is correct that there is no subrogation in Oklahoma, I think they would fall into the general class of cases whereby their judgment has been satisfied.

[fol. 32] The Court: Uh huh.

Mr. Patterson: By payment of compensation.

The Court: Uh huh.

Mr. Sharp: Is that right, Judge?

Mr. Pierce: That's right, yes, sir.

Mr. Sharp: It sounds reasonable. However, our death action is 135.

Mr. Patterson: Well, maybe we will owe $1500, I don't

know. I don't know what these people were paid. I don't know what contract they were paid under.

Mr. Sharp: Hugh Barron was a resident of Tulsa, Oklahoma. I don't know about Gates—his place of employment was here. I will check. I think he probably received benefits under the Oklahoma contract; but I can check that.

The Court: Well, if that be the situation then—

Mr. Patterson: We will pay the $1500—

The Court: This judgment will be entered in this case in conformity with the judgment rendered in the others.

Now that will leave pending two cases then where you are of the opinion—

Mr. Patterson: Yes, sir, I think there are suits pending in Detroit or Chicago, or some place; I just don't know.

Mr. Sharp: It seems to me he is right, Judge.

Mr. Pierce: There is one action pending, the Schmyser case—I am just looking at correspondence in the file, Herman F. Schmyser—well, brought by Josephine M. Schmyser, Administratrix.

Mr. Patterson: Where is that pending?

Mr. Pierce: That is in Detroit—this is a Detroit lawyer that writes on that—I don't know.

[fol. 33] Mr. Patterson: I was thinking there was something about Detroit. We can check all of these things out and get—

The Court: What further procedure should be followed in those cases, assuming that you have actions pending in other jurisdictions?

Mr. Patterson: I assume if they have been brought by the right parties, under the Missouri Act within the prescriptive period of the law of the forum where they are pending, I would assume that we have attempted to pay the people $15,000 all along. I just don't know anything about those lawsuits.

The Court: I suppose then what we should do is to give you time to find out just what the facts are with respect to those two cases, and the status of them.

Mr. Patterson: I will do that, yes, sir.

The Court: And then in the light of the disposition made on the others we can then determine what should be done on those two. Okay, anything else?

Mr. Patterson: Not that I know of.

The Court: All right.

Mr. Patterson: Would the Court like for us to report back to him later during the day if we can get this information together?

The Court: If you can do that.

Mr. Patterson: Or maybe we can work it out among ourselves and just submit an order to the Court.

The Court: All right.

Mr. Sharp: That will be agreeable.

The Court: Now, will you prepare findings of fact and conclusions of law, Mr. Patterson?

Mr. Patterson: I would love to, Your Honor.

The Court: I thought you would be that accommodating.

[fol. 34] Mr. Patterson: Yes, I will, Judge.

The Court: You do that then, and get it approved and present it for signature at your earliest convenience.

Mr. Patterson: All right, Your Honor.

Thank you, Sir.

The Court: All right, Gentlemen.

Mr. Sharp: Thank you, Judge.

Filed March 15, 1960.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS FOR CLARIFICATION OF ORDER —December 2, 1959

Be It Remembered that on the 2nd day of December, A. D., 1959, in the above-designated Court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for clarification of order.

The plaintiff was present and represented by Joseph A. Sharp, Esq., Attorney and Counselor at Law, of Tulsa, Oklahoma.

The defendant United States of America was present and represented by Russell Hunt Smith, Esq., Attorney and Counselor at Law, of Tulsa, Oklahoma, Assistant United States Attorney for the Northern District of Oklahoma.

Other defendants were present and represented by Melvin Pierce, Esq., Attorney and Counselor at Law, of Oklahoma City, Oklahoma.

And thereupon the following proceedings were had to-wit:

The Court: All right, gentlemen.

Mr. Sharp: Judge, what we have basically met here for, I don't think it is too much controversy except in the minds of New York and Dallas, on these conclusions of law, paragraph 3, Mr. O'Brien, for the plaintiff, is rather insistent that he wants a determination that Oklahoma law is ap-
[fol. 35] plicable. Mr. Patterson liked it the way we did originally work it out.

Now, basically, I think we come down to the same fact, eventually. The only thing, Mr. O'Brien wrote me in the letter, he is worried about, will we get out of Circuit Court. The Circuit Court says, Well, before we decide this, the other question, is it necessary for the trial judge to determine that he has got to apply one law or the other? As I read it, that is basically his worry—they are afraid the Circuit Court will send it back to determine whether you say it is either Missouri law or Oklahoma law. It seems to me I would be quite candid with Your Honor, it seems to me that on the possibilities we have got, that we have got the issues raised rather pointedly, the way we originally had it, but he does voice that objection.

The Court: Well, the reason that I didn't care to express an opinion on that point is because I think that is a point that will be resolved by the Supreme Court of the United States in this case now pending in that Court. And it is not a question of fact: it is a legal question. And whether I have a conclusion of law stated here or not, if that is a legal question necessary to the decision of the case, the Court of Appeals would reach the question. And additionally, by that time the Supreme Court would have settled it. So it is not necessary for me to try to forecast what the Supreme Court is going to say about it.

Mr. Sharp: I agree with Your Honor on that.

The Court: If that had been an essential to a decision of the case I would have awaited that decision. The reason I went ahead is because I came to the conclusion that I had

to reach the same result regardless of the conclusion reached by the Supreme Court on the question of whether you apply Oklahoma law or Missouri law.

Mr. Sharp: Even—because, eventually you will have to apply the Missouri law, regardless, even if you start out under Oklahoma law you are going to end up in Missouri; you can't make extra-territorial application of the death statute.

The Court: That's right. In other words, you are on the horns of a dilemma; you take the one horn and say that Missouri law applies; then your recovery is based on Mis- [fol. 36] souri wrongful death statute, with the $15,000 limitation—

Mr. Sharp: That's right.

The Court: If we take the other, and say the Oklahoma law applies, then there is no common law action in Oklahoma for wrongful death. The right of action under Oklahoma law is purely statutory. So in applying Oklahoma law we look to the Oklahoma statute—the wrongful death statute and the decisions of the Supreme Court of Oklahoma construing that statute, the Oklahoma Supreme Court has said that the Oklahoma wrongful death statute has no extra-territorial application. So, since the deaths occurred in Missouri, even though it may have been due to negligence which occurred in Oklahoma, under the Oklahoma conflicts-of-law rules we must apply again the Missouri wrongful death statute; so we just come full circle and wind up at the same place.

Mr. Sharp: Well, that was my understanding of it and for that reason, I mean since we are going to get the same result it isn't necessary because we are going to apply Missouri law anyway; that's the way Your Honor feels about it.

The Court: That's the only reason I went ahead and decided—

Mr. Pierce: Otherwise I think Your Honor would have waited—

The Court: I would have—if I had been of the opinion that a decision in the case depended entirely upon the legal question now under consideration by the Supreme Court, with these conflicting decisions of the two Circuits, then I think it would have been good judgment to have awaited

the decision of the Supreme Court. It should not be too far away. The case has been argued. But suppose the Supreme Court decides that question favorable to your position, then you are still on the short end, according to my view of the law, don't you see?

Mr. Sharp: Yes, sir.

The Court: So I just concluded we might as well go ahead.

Mr. Sharp: Now, Judge, the only—like Mr. Smith and Mr. Pierce and I have been talking, the only thing we want to be sure of is that, among other things, we present this conflict of law problem. Then though Mr. Patterson's view is favorable to that in this case—according to the [fol. 37] letter that I received, the holding that they think I am right as far as the conflicts-of-law rule Oklahoma conflicts not being applicable, the only thing we want to make sure is that we present that squarely to the Circuit, because I think we are going to have to eventually go to the Supreme Court—I don't think we will get any relief out of that, to be honest with you, because, as I said, this Union Trust case is kind of on a rule of its own here.

Mr. Pierce: Your Honor, did you not answer that,—I think that the answer rests not on the facts of the case since the question is one of law, and the question is there for the Circuit if they want to say that in their opinion the rule of law applicable to these facts—

The Court: Yes.

Mr. Pierce: Is in the Hess decision, or under the Union Trust Company—it is there for them to decide.

The Court: I have made it as clear as I know how to. If I haven't made it clear up to this point there isn't any way that I can do it.

Mr. Sharp: I think I—you make it abundantly clear to me, Your Honor.

The Court: I see no reason why the matter could not or should not be squarely put to the Court of Appeals.

Mr. Sharp: I think it is about as squarely as it can be.

The Court: I have made the statement on two or three occasions into the record. I wrote a letter in which I—I believe I outlined the same—the same view as to the legal questions involved. I tried to indicate why I felt that it

was not worth while to await this decision by the Supreme Court.

Mr. Sharp: Oh, I think we are agreed on it, aren't we, Melvin?

Mr. Pierce: I think so.

Mr. Smith: I wondered if you wanted to ask the Court to review that other matter.

[fol. 38] Mr. Sharp: It was merely some grammatical correction. I don't think it has anything to do with anything except—do you, Melvin?

Mr. Pierce: Nothing.

Mr. Smith: Has the Court seen this?

Mr. Sharp: He has seen this; it has nothing to do—it is nothing but a grammatical correction.

Didn't you change that? I thought you did.

There is no change in the substance at all.

Mr. Pierce: That's right. We worked until midnight figuring that thing out.

Mr. Sharp: We had fourteen different points of view on what Your Honor said—you would be surprised. I mean, people heard Your Honor different in one room.

The Court: That's one reason I hesitate to start talking again.

Mr. Sharp: The only thing we changed, we had omitted some cases in the caption, and some cases were incorrectly designated. There has been no substantive change in that at all. Some grammatical corrections have been changed.

The Court: The only person who signed it was Mr. Patterson.

Mr. Sharp: I'm going to sign it right now.

The Court: Will there be other signatures on it? If so, I will sign it.

Mr. Sharp: I will have to get Phil Landa to sign it.

Filed March 15, 1960.

[fol. 39] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 44] Minute entry of argument and submission—September 14, 1960 (omitted in printing).

[fol. 45]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 6378-6391

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of Debra Sue Richards et al., Petitioners,

v.

UNITED STATES OF AMERICA, et al., Respondents.

Joseph A. Sharp (Speiser, Quinn & O'Brien, Edward M. O'Brien; Rucker, Tabor, Best, Sharp & Shepherd, Truman B. Rucker and O. H. "Pat" O'Neal were with him on the brief) for Appellants.

Sherman L. Cohn, Department of Justice Attorney, (George Cochran Doub, Assistant Attorney General; B. Hayden Crawford, United States Attorney; and Morton Hollander, Department of Justice Attorney, were with him on the brief) for Appellee, United States of America.

Fred M. Mock (W. B. Patterson and Melvin F. Pierce were with him on the brief) for Appellee, American Airlines, Inc.

Before Murrah, Chief Judge, and Bratton and Pickett, Circuit Judges.

OPINION—November 25, 1960

BRATTON, Circuit Judge:

A passenger airplane owned and operated by American Airlines on a regularly scheduled flight crashed in Missouri and everyone on board was killed. Invoking pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. §§1346, 1402, and the so-called Wrongful Death Statutes of Oklahoma, O.S. 1951, Title 12, chapter 17, §1051, et seq.,

survivors or legal representatives of passengers who lost their lives instituted in the United States Court for [fol. 46] Northern Oklahoma fourteen separate actions against the United States for the recovery of damages. The basis of the claim pleaded in each case was negligence on the part of the United States, acting through the Civil Aeronautics personnel, in permitting American Airlines to employ and use unsafe practices and procedures at its overhaul depot at Tulsa, Oklahoma, in repairing, rebuilding, overhauling, and inspecting its aircraft, aircraft engines, and component parts. More specifically, it was pleaded that as the result of such negligence, an unfit and unsafe cylinder was placed in one of the engines of the airplane at the overhaul depot; that the cylinder failed; and that such failure caused the crash. The United States denied negligence; denied liability; pleaded that the accident was an unavoidable casualty; pleaded that the complainants were barred from recovery against the United States by reason of payments made to them by American Airlines and releases given to such company; and pleaded in the alternative that the amounts paid should be taken into account in mitigation of damages against the United States. And by third party complaints, the United States asserted against American Airlines a right of indemnity in the event of recovery against the United States. American [fol. 47] Airlines pleaded that the complaints failed to state a cause of action against the United States; pleaded that the deaths were an unavoidable casualty; pleaded that the actions were barred by the statutes of limitation of Missouri; and pleaded that certain of the complainants were barred from recovery against the United States by reason of releases given to American Airlines. The actions were consolidated for trial. In some of the cases, American Airlines made payment in each case of $15,000 to the complainants and releases and satisfactions of liability were executed. In the other cases, American Airlines during the course of a pre-trial conference tendered to the complainants in each case $15,000. Following the pre-trial conference, findings of fact and conclusions of law were made; and judgments were entered dismissing the actions.

The cases present a situation in which the alleged wrongful acts and conduct on the part of the United States occurred in Oklahoma and the deaths of the decedents occurred in Missouri. While it would be trite in ordinary circumstances to do so, it may be appropriate in this case to say that, in the absence of a controlling statute providing otherwise, the general rule is that where an act of omission [fol. 48] or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place. Betts v. Southern Railway Co., 71 F.(2d) 787; Hunter v. Derby Foods, 110 F.(2d) 970; Lowry v. International Brotherhood, etc., 220 F.(2d) 546; Eastern Air Lines v. Union Trust Co., 221 F.(2d) 62, certiorari denied, 350 U.S. 911; Orr v. Sasseman, 239 F.(2d) 182; Cameron v. Vandegriff, 53 Ark. 381, 13 S.W. 1092; Strogoff v. Motor Sales Co., 302 Mass. 345, 18 N.E.(2d) 1016; Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766; Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 194 N.E. 692; Hughes Provision Co. v. La Mear Poultry & Egg Co., (Mo. App.), 242 S.W.(2d) 285; Gaston v. Wabash Railroad Co., (Mo.), 322 S.W.(2d) 865; Mann v. Policyholders' National Life Insurance Co., 78 N.D. 724, 51 N.W.(2d) 853. See also Restatement, Conflict of Laws §377. And that rule has been applied in cases in which the act of omission or commission in respect to a passenger airplane occurred at one place while the resulting accident and death took place at another. Faron v. Eastern Airlines, 84 N.Y.S.(2d) 568; Riley v. Capital Air-[fol. 49] lines, 199 N.Y.S.(2d) 515. It is readily conceivable that solution of the problem could be more difficult in a case in which the initial act of omission or commission occurred at one place, personal injury at another, and resulting death later at a third. But no situation of that kind is presently presented.

If the Tort Claims Act were silent in respect to the matter and the general rule to which reference has been made had application with controlling effect, it seems clear that the situs of the actionable wrong involved in these cases would be in Missouri and the liability of the Government to respond in damages would be referable to the substan-

tive law of that state. But the Tort Claims Act is not silent in that area. For reasons of its own choice, Congress took effective action to make a different rule applicable to the Government in such cases. Title 28, section 1346(b), United States Code, authorizes suits against the Government for death caused by the negligent or wrongful act of an employee of the Government while acting within the scope of his employment if a private person would be liable in accordance with the law of the place at which such act or omission occurred. And Title 28, section 2674, provides in presently pertinent part that the Government shall be liable [fol. 50] in respect to the provisions of the title relating to tort claims in the same manner and to the same extent as a private person under like circumstances. When construed together, the effect of the two provisions in a case in which the act or omission occurs at one place and the resulting death at another is to subject the Government to liability according to the tests and standards of the substantive law of the state in which the act or omission occurred. Except when expressly provided otherwise in the Act itself, the effect of the two provisions in a case in which the act or omission occurs at one place and resulting death at another is to equate the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred. Eastern Air Lines v. Union Trust Co., supra; Voytas v. United States, 256 F.(2d) 786. Concededly, a contrary view was expressed in United States v. Marshall, 230 F.(2d) 183, and Hess v. United States, 259 F.(2d) 285, vacated on grounds not germane here, 361 U.S. 314. But we are persuaded that our view finds adequate support in the Act.

The Supreme Court of Oklahoma has had occasion to [fol. 51] observe from time to time that at common law the wrongful death of a person did not create a right of action for damages; and that the right of action in that state is purely statutory. F. W. Woolworth Co. v. Todd, 204 Okl. 532, 231 Pac.(2d) 681; Gochenour v. St. Louis San Francisco Railway Co., 205 Okl. 594, 239 Pac.(2d) 769; Herndon v. Dolton-Barnard Hardware Co., (Okl.), 289 Pac.(2d) 970;

Mathies v. Kittrell, (Okl.), 350 Pac.(2d) 951. The right of action in that state is created by 12 O.S. 1951 §1053. The statute provides in substance that when the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission; it further provides that the damages shall inure to the persons named; and it further provides the manner in which such damages shall be distributed. The statute in its entirety creates a new right of action, specifies the persons who may maintain the action, and blueprints the distribution of the damages recovered in the action. Gochenour v. [fol. 52] St. Louis San Francisco Railway Co., supra. But it does not indicate directly or indirectly a legislative intent or purpose to undertake to create a cause of action for wrongful death occurring in another state. Neither does it suggest an intent or purpose to make it apply to actions brought in the courts of Oklahoma for wrongful death occurring outside the state. Standing alone, it is limited in effect to wrongful deaths which occur in Oklahoma. However, assuming that it is brought in the name of the proper party plaintiff, against the proper party defendant, with jurisdiction over the person of the defendant, a transitory action for wrongful death occurring in another state may be maintained in the courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy. An action of that kind in the courts of Oklahoma is not one under the domestic statute of Oklahoma relating to wrongful death. It is one for the enforcement of a right of action having its source in the law of the state in which the wrongful death occurred. Chicago, Rock Island & Pacific Railway Co. v. McIntire, 29 Okl. 797, 119 Pac. 1008; McCoubrey v. Pure Oil Co., 179 Okl. 344, 66 [fol. 53] Pac.(2d) 57; Gochenour v. St. Louis San Francisco Railway Co., supra; Fenton v. Sinclair Refining Co., 206 Okl. 19, 240 Pac.(2d) 748.

It was pleaded in the complaints in these cases that the actions arose under the Tort Claims Act, supra; and that they were brought under the Wrongful Death Statutes of Oklahoma, supra. No reference was made in the complaints to the laws of Missouri respecting wrongful death. But since the wrongful deaths pleaded in the complaints occurred in Missouri, we take occasion to explore the question whether a cause of action was pleaded for which the complainants were entitled to relief by way of damages under the laws of that state. A right of action for wrongful death exists by statute in Missouri. Nelms v. Bright (Mo.), 299 S.W.(2d) 483. Quite similar to the wrongful death statute of Oklahoma, supra, at the time of the airplane crash referred to herein, it was provided by statute in Missouri that when the death of a person was caused by a wrongful act, neglect, or default of another, and such act, neglect, or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages therefor, an action for damages [fol. 54] might be maintained, notwithstanding the death of the person injured. R. S. Mo. 1939, §3653. And at the time of such airplane crash, it was further provided by statute in Missouri that damages not to exceed $15,000 might be awarded for wrongful death. R. S. Mo. 1939, §3654. No limitation in respect to amount of damages is provided by statute in Oklahoma. But in creating the statutory right of action for wrongful death, it was competent for Missouri to fix the maximum amount of damages recoverable in an action under such statute. And this court is committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered. Stoltz v. Burlington Transportation Co., 178 F.(2d) 514, certiorari denied, 339 U.S. 929; Burlington Transportation Co. v. Stoltz, 191 F.(2d) 915.

The maximum recovery of damages under Missouri law at the time of the airplane crash being $15,000, payment of that amount to the complainants in some of these cases

and the deposit of that amount in the registry of the court [fol. 55] in the other cases, constituted full satisfaction for the wrongful deaths, the causes of action under the law of Missouri became extinguished, and recovery against the tort feasor or tort feasors was barred. Hanson v. Norton, 340 Mo. 1012, 103 S.W.(2d) 1.

The judgments of dismissal are severally affirmed.

MURRAH, Chief Judge, dissenting:

I agree that the government is liable in these cases as a private person in accordance with Oklahoma law, i.e., the place where the alleged negligent act or omission occurred. I also agree that the inapplicability of the Oklahoma wrongful death statute to deaths outside the state does not preclude the right to recover in cases like these, even though a private person would not be liable according to Oklahoma law under the same circumstances.

We know that few, if any, state wrongful death statutes have any extraterritorial effect. If, therefore, the right to recover under the Tort Claims Act in cases like these is made to depend upon the extraterritorial effect of the [fol. 56] wrongful death statute of the place of the negligent act, the Act would be inapplicable to all such cases. Surely Congress did not intend any such anomalous result.

The majority avoids this blind spot in the law by resort to the Oklahoma conflict of laws rule, which authorizes maintenance of a suit in Oklahoma for wrongful death occurring outside the state, in accordance with the law of the state where death resulted. And see Fenton v. Sinclair Refining Co., 240 P.2d 748. The effect of this process of reasoning is to apply the substantive law of the place of death rather than the law of the place of the negligent act. The end result seems contrary to our agreed interpretation of the Tort Claims Act. Indeed, under this theory, these suits might have been instituted and maintained in any forum which authorizes them, with liability governed by the law of the place where death occurred, i.e., Missouri. Thus, if the suits had been commenced in Missouri, the Missouri court would have looked to the law of Oklahoma as the place

where the negligent act occurred, and the Oklahoma conflicts rule would apply the law of Missouri as the place where death occurred.

In my view, Congress intended to avoid this circuitous [fol. 57] stacking of one conflicts rule on another in order to arrive at controlling substantive law. Rather, it is my view that the Tort Claims Act provides its own conflicts rule, that is, the law of the place of the negligent act. In other words, we rest upon the law of that state and look no further. If Congress had intended otherwise, it could have simply conferred jurisdiction upon the courts to hear and decide claims for damages for death caused by the negligence of the United States "under circumstances where the United States, if a private person, would be liable to the claimant" and stopped there. In this setting, these suits would be maintainable in Oklahoma in accordance with the law of Missouri, by virtue of the Oklahoma conflicts rule, that is, the law of the place where the accident occurred. When, however, Congress went on to say in effect that the government would be liable to the claimant as if a private person "in accordance with the law of the place where the act or omission occurred," it thereupon removed the traditional cloak of immunity and left the government standing as a private person, but prescribed the law and the conditions under which it would become liable.

Such is the import and result of Eastern Airlines v. [fol. 58] Union Trust Co., 221 F.2d 62. I would follow the majority view in that case and apply the Oklahoma wrongful death statute.

[fol. 59]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Sam G. Bratton and Honorable John C. Pickett, Circuit Judges.

JUDGMENT—November 25, 1960

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of dismissal are severally affirmed.

[On December 31, 1960, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.]

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUZANNE THOMAS RICHARDS, etc., et al., Petitioners,

No. 753, October Term, 1960

SUZANNE THOMAS RICHARDS, ETC., et al., Petitioners,

vs.

UNITED STATES et al.

ORDER ALLOWING CERTIORARI—May 8, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 19~~60~~ 61

No. 59

SUZANNE THOMAS RICHARDS, nee Wadlow, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD M. O'BRIEN and
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INDEX

	PAGE
Opinion Below	2
Basis of Jurisdiction	2
Statutes Involved	2
Questions Involved	3
Question 1	3
Question 2	3
Statement of Case	4
Holdings of Courts Below	6
Reasons for Granting the Writ	9
Reason 1	9
Reason 2	17
Reason 3	23
Prayer	26
APPENDIX	
Statutes Involved	27
Opinion of Court of Appeals	30
Judgment of Court of Appeals	38
Judgment of District Court	40

Table of Cases Cited

PAGE

Cook v. United States, 274 F. 2d 689 ..... 10, 14

Dalehite v. United States, 346 U. S. 15 ..... 14, 18, 24

Eastern Air Lines, Inc. v. Union Trust Company, 221 F. 2d 62 certiorari denied, 350 U. S. 911 ..... 10, 11, 14

Feres v. United States, 340 U. S. 135 ..... 14. 18, 24
F. W. Woolworth Co. v. Todd, 204 Okl. 532 24

Glus v. Brooklyn Eastern District Terminal, 359 U. S. 231 9

Hatahley v. United States, 351 U. S. 173 14
Hess v. United States, 259 F. 2d 285, rev'd on other grounds, 361 U. S. 314 ..... 10, 12, 13, 14
Hoffman v. Blaski, 363 U. S. 335 9
Hunter v. Derby Foods, 110 F. 2d 970 25

Irvin v. United States, 148 F. Supp. 25 15

Landon v. United States, 197 F. 2d 128 14

Massachusetts Bonding & Insurance Co. v. United States, 352 U. S. 128 ..... 9, 22
Matland v. United States, —— F. 2d —— (CCH 7 Avi. 17,144) 16
Modla v. United States, 151 F. Supp. 198 15
Moran v. United States, 102 F. Supp. 275 15

Olson v. United States, 175 F. 2d 510 15
Osaka Shosen Kaisha Line v. United States, 300 U. S. 98 ..... 17, 18

PAGE

Richards v. United States, —— F. 2d —— (Appendix, pp. 30-38) 10

State of Maryland, to use of Burkhardt v. United States, 165 F. 2d 869 ..... 22, 25

United States v. Marshall, 230 F. 2d 183 ..... 10, 11, 12, 14
United States v. Schaefer Brewing Co., 356 U. S. 227 10
United States v. Spelar, 338 U. S. 217 ..... 18, 19

Van Camp & Sons v. Am. Can Co., 278 U. S. 245 18
Voytas v. United States, 256 F. 2d 786 ..... 10, 11, 14

Zaccari v. United States, 130 F. Supp. 50, 51 (D. Md. 1955) 15

Statutes

Federal Tort Claims Act, 28 U. S. C.:

Section 1346(b) 2, 17, 22, 23, 27
Section 1402(b) 2, 15, 17, 27
Section 2401(b) 22
Section 2402 22
Section 2672 ..... 2, 17, 27, 28
Section 2674 ..... 2, 17, 22, 28
Section 2675(a) 17
Section 2676 17
Section 2680 ..... 17, 22
Section 2680(a) 17
Section 2680(e) 17

PAGE

Missouri Wrongful Death Statute, Ch. 537, V. A. Mo. S. Sec. 537.080, R.S. 1939, Sec. 3653 ..... 2, 29

Oklahoma Wrongful Death Statute, 12 Okl. St. Ann. Sec. 1051-1054 ..... 2, 28, 29

Miscellaneous

Committee Print of a Committee Revision of H.R. 5373, 77th Cong., 2d Sess., Secs. 201, 301 19

Goodrich, *Conflict of Laws*, 263-64 (1949) 25

Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws*, 50 Col. L. Rev. 881 (1950) 15

Hearings before House Committee on the Judiciary, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463 *(Memorandum with appendixes, for the use of the Committee on the Judiciary, Explanatory of Committee Print of H.R. 5373, pp. 37-46)* 18

Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463 20

pp. 1-6 21

p. 9 20

pp. 24-30 20

p. 26 20

p. 27 20

p. 29 20

pp. 30-36 20

PAGE

H.R. 5299, 77th Cong., 1st Sess., Sec. 201 19
H.R. 5373, 77th Cong., 1st Sess., Sec. 201 19

Leflar, *Choice of Law; Torts: Current Trends*, 6 Vand. L. Rev. 447 (1953) 15

Memorandum, with appendixes, for the use of the Committee on the Judiciary—Explanatory of Committee Print of H.R. 5373, pp. 42-43 19

Restatement, *Conflict of Laws*, §§377-78 (1934) 25
S. 2690, 76th Cong., 1st Sess., Sec. 201 ..... 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

SUZANNE THOMAS RICHARDS, nee Wadlow, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Suzanne Thomas Richards, Harvey Baruck, Clarine Farough, Bernice L. Maupin, Margaret J. Howe, Elizabeth R. Cross, Therese B. Akin, Althea S. Gates, Ruth Jean Carr-Harris, Anna Mae O'Neal, Margaret Emma Barron, Myra Fields, Virginia Hobson, and Josephine M. Schmyser, respectfully pray for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered herein November 25, 1960, affirming by a divided court, the judgment of the United States District Court for the Northern District of Oklahoma dismissing their respective complaints with prejudice on the ground that appellants had no actionable claims against the United States of America.

Opinion Below

No opinion was written by the District Court in dismissing the complaints. The judgment of the District Court was entered and filed January 18, 1960, and was based upon findings of fact, conclusions of law and order of judgment made by the Court. The opinion of the Court of Appeals, affirming the judgment of the District Court is not officially reported as yet.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1), to review a judgment of the Court of Appeals dated and entered November 25, 1960, affirming the judgment of the District Court dismissing the complaints in the fourteen actions with prejudice.

Statutes Involved

The pertinent provisions of the Federal Tort Claims Act, 28 U. S. C. Sections 1346(b), 1402(b), 2672, 2674, the Oklahoma Wrongful Death Statute, 12 Okl. St. Ann. Section 1053, and the Missouri Wrongful Death Statute, Chapter 537, V. A. Mo. S. Section 537.080 (R.S. 1939, Sec. 3653), are set forth in the Appendix, *infra*, pp. 27-29.

The Questions Involved

Question 1

Do the provisions of the Federal Tort Claims Act, that the liability of the United States shall be determined in accordance with the law of the place where the negligent act or omission occurs, require the Federal District Court sitting in Oklahoma to apply the Oklahoma wrongful death statute to petitioners' wrongful death claims against the United States of America, where the deaths of decedents within the State of Missouri were caused by the negligent acts and omissions of the Government's employees which occurred within the State of Oklahoma?

Question 2

Although the liability of a private person in a wrongful death action brought against him in the courts of Oklahoma to recover damages for a wrongful death which occurred in Missouri as a result of his negligent acts and omissions which occurred in Oklahoma would be determined by the law of Missouri because (1) the Oklahoma conflict of laws rule would require such reference and (2) the Oklahoma wrongful death statute has no extraterritorial application to a death which occurs in Missouri, should not the courts below have been required by the provisions of the Federal Tort Claims Act to apply the Oklahoma wrongful death statute, under the same circumstances, to determine the liability of the United States of America in actions commenced against it pursuant to the provisions of the Tort Claims Act?

Statement of Case

On August 4, 1955, the decedents were riding on a regularly scheduled passenger flight of American Airlines, Inc. between Tulsa, Oklahoma and New York City. The airplane crashed in the State of Missouri, killing everyone on board.

Fourteen separate actions were commenced by the personal representatives or the widows of the decedents against the United States of America in the United States District Court for the Northern District of Oklahoma. The actions were brought pursuant to the provisions of the Federal Tort Claims Act, 28 U. S. C. §§1346(b), 1402(b) and 2671-2680. Jurisdiction of the District Court was based upon 28 U. S. C. §1346(b). Petitioners sought to recover damages under the Oklahoma Wrongful Death Statute, Title 12 Okl. Stat. Ann. §§1051-1054, for the wrongful deaths of their respective decedents. No cause of action or claim was pleaded in the complaints which sought recovery under the wrongful death statute of Missouri.

In their complaints, the petitioners alleged that the United States was negligent, acting through its Civil Aeronautics Administration employees, in permitting and failing to prevent and prohibit unsafe inspection, maintenance and overhaul procedures engaged in by American Airlines at American's overhaul depot in Tulsa, Oklahoma; that as a result of such negligence, an unairworthy cylinder was installed on one of the engines of the airplane at the overhaul depot; that during the airplane's flight the unairworthy cylinder failed, causing the crash of the airplane and the deaths of petitioners' decedents.

The respondent, United States of America, denied the allegations of negligence and liability and alleged, *inter*

alia, that certain of the petitioners were barred from recovery by reason of payments made to them by American Airlines and releases given to that company.[1] The United States filed a third party complaint against respondent American Airlines, asserting a right of indemnity in the event a recovery was made against the United States. Respondent, American Airlines, Inc., denied that petitioners' complaints stated a claim against the United States upon which relief could be granted; and alleged, *inter alia*, that petitioners' claims were barred by the Missouri statute of limitations of one year and that certain of the petitioners were barred from recovery against the United States by reason of releases given to American Airlines.[2] The actions were thereafter consolidated for trial.

At pre-trial conferences the District Court determined that petitioners had no actionable claims against the United States of America. In accordance with its findings of fact and conclusions of law, the District Court entered its order of Judgment, dismissing the complaints in all four-

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[1] Prior to the commencement of these actions in the District Court, petitioners Richards, Baruck, Maupin, Howe, O'Neal and Hobson settled their claims against American under the Missouri death statute and gave their releases in satisfaction thereof. Decedents Barron and Gates were employees of American, therefore, their widows received workmen's compensation payments in lieu of any claim they might have otherwise had against American under the Missouri death statute. Petitioners Akin, Fields, Cross and Carr-Harris each received payment of the maximum amount permitted under the Missouri death statute, $15,000, by an order of distribution of the District Court of such amounts which had been previously deposited in the registry of the District Court by American. Petitioners Farough and Schmyser did not enter into any settlement agreement with American and since they did not commence any action against American within the time allowed under the Missouri death statute, any claim they might have had against American under Missouri law was time barred.

[2] Since petitioners' claims against American under the Missouri death statute have been settled in twelve actions and time barred in two actions, they concede that they have no actionable claims against the United States under the *Missouri* death statute.

teen actions with prejudice. Upon appeal, the Court of Appeals for the Tenth Circuit, with one Judge dissenting, affirmed the judgment of the District Court.

Holdings of the Courts Below

The crux of the District Court's determination that petitioners had no actionable claim against the United States is set forth in Paragraphs II to VII in its conclusions of law. Because of their conciseness and brevity, they are reproduced in their entirety:

"II. In the actions by plaintiffs against the United States of America, the provisions of the Federal Tort Claims Act, 28 U. S. C. 1346(b) et seq. are applicable.

III. It is unnecessary to decide whether the law applicable to the plaintiffs' claims against the United States of America is that of the State of Missouri or the State of Oklahoma, for in either case the plaintiffs have no actionable claims against the United States of America.

IV. There is no cause of action under the Oklahoma Wrongful Death Statute where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri.

V. If Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including the conflicts of law rule, is applicable thereunder.

VI. The Oklahoma conflicts of law rule requires that in the circumstances of these cases the plaintiffs' claims be determinable by reference to the Missouri Wrongful Death Statute.

VII. The plaintiffs have no further claims under the Missouri Wrongful Death Statute for the reason that they have already received full satisfaction for any claims they might have thereunder."

Upon appeal to the Court of Appeals, petitioners argued that the District Court was in error in the following respects: (1) The language of the Tort Claims Act is clear and explicit. If Congress had intended to measure the Government's liability in accordance with the law of the place of the tort, death, wrong, or injury, it could easily have said so; however, it did not. In applying the law of the place of death, Missouri, to petitioners' claims, the District Court completely negated the ordinary meaning of the language actually used by Congress; (2) Since the jurisdiction of the District Court was based upon a federal statute containing its own choice of law rule, the District Court was in error in applying the Oklahoma conflict of laws rule. Its application of the Oklahoma conflicts rule defeated the congressional mandate and intent that the liability of the Government should be determined in accordance with the law of the state where the negligent act or omission occurred; (3) In providing claimants a remedy against the Government, Congress was competent to impose any condition on that remedy it desired, including its own choice of law rule to determine the Government's liability. The choice of law rule specified by Congress in the Act does not change, in any manner, the established law of the states with regard to the application in wrongful death actions of the states' conflict of laws rules or the extraterritorial application of its death statutes, because the choice of law set forth by Congress in the Tort Claims Act can only have application to actions commenced against the United States of America.

The Court of Appeals, in affirming by a divided court, determined that the Oklahoma wrongful death statute could not be applied in the action because the deaths occurred in another state; since the wrongful deaths pleaded in the complaints occurred in Missouri, the Court was "committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered."; and since petitioners were paid the maximum amount under the Missouri Wrongful Death Statute, such payment constituted full satisfaction for the wrongful deaths, the causes of action under the law of Missouri became extinguished, and recovery against the tort feasor or tort feasors was barred.

The dissenting opinion of Chief Judge Murrah stated that the inapplicability of the Oklahoma wrongful death statute to deaths occurring outside of the state does not preclude the right to recover in actions against the United States under the Tort Claims Act, even though a private person would not be liable according to Oklahoma law under the same circumstances; since few, if any, state wrongful death statutes have any extraterritorial effect, Congress could not have intended that the right to recover in multi-state tort situations be dependent upon the extraterritorial effects of the wrongful death statute of the place where the negligent act or omission occurred; that resort to the Oklahoma conflict of laws rule could lead to a situation in which the law of two states would each refer to the law of the other in determining the liability of the Government; that Congress intended to avoid such a situation by providing its own rule as to the proper law to be applied in such cases, that is, the Court should look to the state of the negligent act and no further; if Congress

intended otherwise, it could have simply omitted from the language of the Act the words "in accordance with the law of the place where the act or omission occurred"; by the inclusion of those words, Congress prescribed the law and the conditions under which the Government would become liable.

Reasons for Granting the Writ

I.

The Court of Appeals has decided an important question of law arising under a Federal Statute in conflict with decisions of other Courts of Appeal on the same matter. The question decided below has not been, but should be, decided by this Court.

The question before the Courts below was: What law did Congress intend to be applied to determine the liability of the United States in wrongful death actions commenced against it pursuant to the provisions of the Federal Tort Claims Act, where the wrongful death occurring within the territory of one state is caused by the negligent act or omission of the Government's employees occurring within the territory of another state, the law of the state where the death occurs or the law of the state where the negligent act or omission occurs?

This important and recurring[3] question pertaining to the construction of the Federal Tort Claims Act[4] has been decided by the circuits in a conflicting and confusing[5] manner

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[3] Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232 (1959).

[4] Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 128, 130 (1956).

[5] Hoffman v. Blaski, 363 U.S. 335, 339 n. 8 (1960).

and without any of the uniformity of application[6] this federal statute requires. In the circuits which have passed on this question since the Act was passed by Congress in 1946, the decisions of the Seventh and District of Columbia Circuit courts in two cases[7] are in direct conflict with the decisions of the Ninth and Tenth circuit courts in three cases.[8] In two of these cases the dissenting judges expressly rejected the majority's holding on this question.[9]

The first case to be decided under the choice-of-law provision in the Federal Tort Claims Act was *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F. 2d 62 (D. C. Cir. 1955) *cert den.*, 350 U. S. 911 (1955). In that case the negligent acts and omissions of the Government's employees located in the C. A. A. control tower in the State of Virginia resulted in the collision of two airplanes and the deaths of passengers in the District of Columbia. The court

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[6] United States v. Schaefer Brewing Co., 356 U.S. 227, 230 (1958).

[7] Voytas v. United States, 256 F. 2d 786 (7th Cir. 1958); and Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d 62 (D.C. Cir. 1955), *cert. den.*, 350 U.S. 911 (1955).

[8] United States v. Marshall, 230 F. 2d 183 (9th Cir. 1956); Hess v. United States, 259 F. 2d 285 (9th Cir. 1958), *rev'd on other grounds*, 361 U.S. 314 (1960); and Richards v. United States, —— F. 2d —— (10th Cir. November 25, 1960), Appendix p. 30, *infra*.

[9] Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d at 80 (Judge Miller writing for the Court dissented therein on the question of the choice-of-law applicable); Richards v. United States, —— F. 2d ——, Appendix, p. 37, *infra* (Chief Judge Murrah dissented on the ground that the majority view in *Union Trust* should be followed). See also, Cook v. United States, 274 F. 2d 689, 692 (2d Cir. 1960) in which Judge Magruder of First Circuit, sitting by designation, in his dissent on the question of damages indicated strong doubt as to the correctness of the majority view in *Union Trust* on the choice-of-law provision in the Tort Claims Act. However, because the parties agreed by stipulation to be bound by the decision in *Union Trust*, Judge Magruder recognized that holding as the law of the case.

held that since Congress provided in explicit terms for the Government's liability to be measured under the law of the place where its negligent employee's act or omission occurred, the law of Virginia should be applied.[10] In his dissent on this point, Judge Miller interpreted the words "act or omission" to include the consequences of such acts or omission and since the consequences of the acts or omissions were the deaths occurring in the District of Columbia, that law should have been applied.

The District of Columbia Circuit's holding was followed in *Voytas* v. *United States*, 256 F. 2d 786 (7th Cir. 1958). There the alleged negligent acts and omissions occurred in two states, Virginia and Illinois, and the injury and death resulting from such acts and omissions occurred in Illinois. A soldier stole some explosives from his camp in Virginia and, while on leave in Illinois, he gave them to a young boy who used them in a manner which resulted in the death of plaintiff's son. Plaintiff alleged negligent acts and omissions of the Government: (1) in Virginia, in the handling, transporting, storing and guarding of the explosives and in failing to discover that the soldier had the explosives in his possession prior to going on leave, and (2) in Illinois, in the soldier's giving the explosives to the boy. The court looked to the law of Illinois to determine the liability of the Government for the soldier's acts in that state, and it looked to the law of Virginia to determine the liability of the Government for its acts and omissions in Virginia.

A contrary view of the choice-of-law provisions in the Act was first taken by the Ninth Circuit in *United States* v. *Marshall*, 230 F. 2d 183 (9th Cir. 1956). Plaintiff alleged that the negligent acts and omissions of the Government's

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[10] The petition of the Union Trust Compar for a writ of certiorari to review this holding was denied, Union Trust Co. v. United States, 350 U.S. 911 (1955).

employees in loading, labelling and shipping containers of compressed gas, which occurred in the State of Utah, resulted in the explosion of these containers and his injuries in the State of Idaho. The court held that the law of Idaho applied because the words in the Tort Claims Act meant the place where the act or omission "became operative, directly causing the injury and not the places where the negligence existed but was then inoperative." [11]

Two years later, the Ninth Circuit reaffirmed this view in *Hess* v. *United States*, 259 F. 2d 285 (9th Cir. 1958), *rev'd on other grounds*, 361 U. S. 314 (1960).[12] There the appellant conceded that because the decedent's death occurred in the navigable waters of the Columbia River, the general maritime law would apply the wrongful death statute of Oregon to determine the liability of a private defendant. However, appellant contended since the Tort Claims Act makes the Government liable in accordance with the law of the place where the act or omission occurred and the negligent acts of the Government occurred on the dam which is an extension of the Oregon land, the court should apply the Employers' Liability Law of Oregon, as that is the law that would be applied against a private defendant for negligence occurring on the land in that state. The court rejected appellant's contention and the holding of the *Union Trust* case on this issue. Instead, it relied on its previous construction of the language in the Tort Claims Act as set forth in the *Marshall* case. The court also held that the law of the state to be applied is not limited to the

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[11] 230 F. 2d at 187.

[12] Although this Court stated in *Hess*, 361 U.S. at 318 n. 7, that the case did not involve a multi-state tort question, petitioners cite the Ninth Circuit's decision to show that in reaching its decision on the choice-of-law question the Court of Appeals was cognizant of the decision in *Union Trust* on this point.

law having direct reference to tort liability. It includes, also, the state's conflict of laws as in diversity cases.[13]

The Tenth Circuit, in the instant litigation, is the latest court to consider this question, *Richards* v. *United States*, —— F. 2d —— (10th Cir. November 25, 1960).[14] In addition to applying the Oklahoma conflict of laws rule, the court gave a new reason for avoiding the application of the Oklahoma death statute to petitioners' claims. The court held that the Oklahoma wrongful death statute has no extraterritorial effect and that it cannot be applied to actions brought in the courts of Oklahoma for wrongful death occurring outside that state. The dissenting judge was of the opinion that Congress avoided the anomaly which results from the majority view by providing its own choice-of-law rule in the Tort Claims Act. The dissent stated that the majority view in *Union Trust* should have been followed by applying the Oklahoma wrongful death statute.

There is, therefore, not only a conflict in the circuit courts on this multi-state tort question, including the internal conflict in two of the courts in which dissents were filed, but also four separate theories expressed by these courts as to what Congress intended when it stated in the Act that the Government would be liable as if a private person "in accordance with the law of the place where the act or omission occurred." These four theories can be stated as follows:

(1) By use of the words "in accordance with the law of the place where the act or omission occurred," Congress intended to have the Government's liability determined in accordance with the local or internal

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[13] 259 F. 2d at 291.

[14] Appendix, pp. 30-38, *infra*.

law of the state in which the negligent employee was located at the time he was negligent;[15]

(2) The law of the state where the act or omission occurred refers to the law of the state where those acts or omissions became operative directly causing the injury;[16]

(3) That reference to the law of the state where the act or omission occurred includes reference to the entire law of that state, including its conflict of laws rule;[17]

(4) If the law of the state where the negligent act or omission occurred does not apply its wrongful death statute to actions brought in its courts for wrongful death occurring outside that state, such law cannot

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[15] Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d 62, 80; Voytas v. United States, 256 F. 2d 786, 788-790; Richards v. United States, —— F. 2d ——, Appendix, *infra*, p. 37 (Murrah, C.J., dissenting). See also, Dalehite v. United States, 346 U.S. 15, 52-53 (1953) (Jackson, J., dissenting); Hatahley v. United States, 351 U.S. 173, 182; Feres v. United States, 340 U.S. 135, 142 (1950).

[16] United States v. Marshall, 230 F. 2d 183, 187; Hess v. United States, 259 F. 2d 285, 290, *rev'd on other grounds*, 361 U.S. 314; Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d 62, 80 (Miller, J., dissenting in part).

[17] Hess v. United States, 259 F. 2d at 291; Richards v. United States, Appendix, pp. 30-38, *infra*. See Cook v. United States, 274 F. 2d 689, 692 (Magruder, J., dissenting). See also, Landon v. United States, 197 F. 2d 128 (2d Cir. 1952). In the *Landon* case the negligent act and injury occurred in the same state. In his action in the New York District Court, plaintiff recovered for loss of earnings and hospital expenses, although these were paid by plaintiff's employer under an insurance contract. Under New York law losses compensated by a third party are not allowable as damages against the defendant. The court looked to the whole law of New York, including its conflict of laws rule and determined that New York would look to the law of New Jersey where plaintiff was employed and where the insurance contract was to be performed. Since New Jersey allowed such recovery in tort actions, the judgment was affirmed.

be applied to determine the liability of the Government.[18]

Those few authorities who have written on this subject have not offered any solution to this complex multi-state tort problem.[19] In the cases decided by the district courts little can be obtained to offer a solution to the problem, because while the courts acknowledge that the law of the place of the negligent act or omission is applied, the rule is almost always applied to a case in which the negligent act or omission and the injury occur in the same state.[20]

It is noteworthy that petitioners commenced their actions against the United States, in accordance with venue provisions of the Act,[21] in the Northern District of Oklahoma, the judicial district wherein the act or omission complained of occurred. If the petitioners had exercised the option set forth in that venue statute and commenced their respective actions in the judicial district where each resided, at least three of them[22] would have had the law of Oklahoma applied

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[18] Richards v. United States, Appendix, pp. 30, 35, *infra*.

[19] Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws*, 50 Col. L. Rev. 881, 894-895 (1950); Leflar, *Choice of Law; Torts: Current Trends*, 6 Vand. L. Rev. 447, 448 (1953). It is noteworthy that Judge Goodrich has not received any "authoritative answer" from the circuit courts during the ten-year period subsequent to the date of his article, 50 Col. L. Rev. at 895 (1950).

[20] *E.g.*, Moran v. United States, 102 F. Supp. 275 (D.C. Conn. 1951); Modla v. United States, 151 F. Supp. 198 (D.C. N.J. 1957); Irvin v. United States, 148 F. Supp. 25, 28 (S.D. S.D. 1957); Zaccari v. United States, 130 F. Supp. 50, 51 (D. Md. 1955). See also, Olson v. United States, 175 F. 2d 510 (8th Cir. 1949).

[21] 28 U.S.C. § 1402(b).

[22] Petitioners Baruck and O'Neal reside in Illinois and petitioner Howe is a resident of Wisconsin. The district courts of these states are within the Seventh Judicial Circuit and presumably governed by the *Voytas* case, *supra*, note 15.

to determine the liability of the United States; at least two of them,[23] and possibly two others[24] would have had the law of Missouri applied in their cases. Thus, the evil of "forum shopping" is encouraged because of the confusion displayed by the circuit courts in its attempts to determine what Congress intended when it stated that the Government would be liable as if a private person "in accordance with the law of the place where the act or omission occurred."

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[23] Petitioners Hobson and Gates are residents of Colorado and Oklahoma, respectively. Therefore, any appeal they would take from the district court of their residence would be heard by the Tenth Circuit Court of Appeals and presumably governed by the views it stated in the *Richards* decision, Appendix, pp. 30-37, *infra*.

[24] Petitioners Cross and Fields are residents of New York and would probably be governed by the Missouri law, in view of the interpretation of the Second Circuit in the *Landon* case, supra, n. 17. Petitioners Farough and Schmyser reside in Michigan and petitioner Barron is a resident of Tennessee, both of these states being in the Sixth Judicial Circuit. Petitioners Richards and Maupin are residents of Missouri, which is in the Eighth Judicial Circuit. Petitioner Akin resides in Massachusetts, which is in the First Judicial Circuit. Petitioner Carr-Harris is now a resident of Canada, although at the time of her husband's death and for a short time thereafter, she resided in New Jersey and in the Third Judicial Circuit. The First, Third, Sixth and Eighth Circuits have not passed on this precise multi-state tort question.

In a very recent decision of the Third Circuit, Matland v. United States (3d Cir. January 10, 1961) (not officially reported yet, but unofficially reported in *CCH* 7 Avi. 17,144), the court recognized the lack of unanimity of opinion in the federal courts on this question. Although the court was presented with this very question, it concluded that it was not necessary to resolve it because the state law in each case would lead to the same result.

II.

The Courts below have decided an important question of Federal Law in a way which is in conflict with the language and plain meaning of the Act.

The Federal Tort Claims Act provides in explicit terms that the liability of the Government for the negligence of its employees shall be measured "in accordance with the law of the place *where the act or omission occurred.*" (Emphasis added), 28 U. S. C. §1346(b). This phrase is repeated in section 1402(b), which provides that a Tort Claims action may be prosecuted "only in the judicial district where the plaintiff resides or *wherein the act or omission complained of occurred.*" (Emphasis added.) The phrase is again used in 28 U. S. C. §2672, where Congress authorizes administrative settlements of certain claims if the United States is liable "in accordance with the law of the place *where the act or omission occurred.*" (Emphasis added.) It is used still again in 28 U. S. C. §2674, which makes the United States liable for actual or compensatory damages if "the law of the place *where the act or omission* complained of" provides for only punitive damages. (Emphasis added.) Such words are also used in sections 2675 (a), 2676, 2680(a) and 2680(e). The use of the same language shows a deliberate and consistent intent on the part of Congress to have the liability of the Government measured by the law of the place where its employees' negligent acts or omissions occur.

The basic objective in statutory construction is, of course, to ascertain the legislative intent.[23] There is no better or more authoritative guide to that meaning than the language of the statute itself; "if the language be clear,

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[23] Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 101.

it is conclusive."[26] "The words being clear, they are decisive. There is nothing to construe."[27] It is difficult to conceive of any more explicit or more precise language which could possibly have been used by Congress to command application of the law of the place of the negligent conduct than the words which it did employ. If the congressional intent had not been to measure the Government's liability by the law of the place where the act or omission occurred, but instead was to measure such liability by the law of the place where the tort resulted, it could easily have said so. It could have said that the Government shall be liable "in accordance with the law of the place where the cause of action arose" or "in accordance with applicable state law" or "under circumstances where the United States, if a private person, would be liable to the claimant." However, it did not. Instead, it directed application of the law where the act or omission occurred.

The legislative history and general congressional purpose of the Tort Claims Act have been thoroughly considered in prior decisions of this Court.[28] However, since the specific choice-of-law provision contained in the Act has not been previously considered by this Court, a summary of the legislative background pertaining to this provision will be useful. Most of the earlier tort claims bills[29]

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[26] Ibid.

[27] Van Camp & Sons v. Am. Can Co., 278 U.S. 245, 253.

[28] Dalehite v. United States, 346 U.S. 15, 24-31; Feres v. United States, 340 U.S. 184; United States v. Spelar, 338 U.S. 217. See also, *Hearings before House Committee on the Judiciary, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463 (Memorandum, with appendixes, for the use of the Committee on the Judiciary, Explanatory of Committee Print of H.R. 5373, pp. 37-46).*

[29] *E.g.*, S. 2690, 76th Cong., 1st Sess., introduced in 1939. This bill proposed conferring jurisdiction on the courts to determine claims for injury or death "caused by the negligent or wrongful act or omission" of Government employees (Sec. 201). It pro-

did not contain any language as to what law would govern the liability of the Government. The shape of the Act was largely determined during its consideration in the course of the 77th Congress.[30] The first time the "place where the act occurred" language appeared was in the Committee Print of a Committee revision of H.R. 5373, 77th Cong., 2d Sess., Secs. 201, 301. The Committee Reports are inclusive as to the reason for the change, but one thing which is made clear is that the words "place where the act or omission occurred" mean the local law of the place where the negligent act or omission occurred.[31] Additional evidence of congressional intent to have local law determine the Government's liability is clearly shown by an examination of a statement made part of the hearings held by the House

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vided: "In respect to such claims the United States shall be liable to the same extent and in the same manner as a private individual under like circumstances. . . .", but it did not contain the significant language now in § 1346(b), *viz.*, "in accordance with the law of the place where the act or omission occurred." The same was true of H.R. 5299 and H.R. 5373, 77th Cong., 1st Sess., Sec. 201.

[30] United States v. Spelar, 338 U.S. 217, 220 n. 9.

[31] Indicating the difference between H.R. 5373 and the Committee's revision, it is stated (*Memorandum, with appendixes, for the use of the Committee on the Judiciary—Explanatory of Committee Print of H.R. 5373, pp. 42-43* [Emphasis added]):

"The present bill follows closely the pattern of H.R. 7236 and H.R. 5373, *with two important exceptions.* H.R. 7236 vested concurrent jurisdiction over tort claims in the United States district courts and the Court of Claims. The present bill vests exclusive jurisdiction in the district courts sitting without a jury, with an appeal from their decision to the Court of Claims. . . ."

"The other major difference is that the present bill subjects the determination of the validity of the claim, the defenses thereto, and the distribution of the recovery, to the *law of the place where the delinquent act or omission occurred.* H.R. 7236 and H.R. 5373 may, as a matter of law, have embodied the first of these requirements to some extent, but the present bill states this explicitly, and leaves to the *local law* the determination of certain matters specifically treated in H.R. 7236 and H.R. 5373, such as the beneficiaries entitled to the recovery in death cases, the defense of contributory negligence and the like. . . ."

Committee on the Judiciary concerning this Act.[32] The intent to have local law govern liability is also supported by the testimony of Assistant Attorney General Shea during the hearing before the House Committee on the Judiciary on H.R. 6463.[33] The following colloquy appears on P. 30:

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[32] *Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463, pp. 24-30.* In the discussion of H.R. 6463 and comparison with H.R. 5373 it is stated with respect to administrative adjustments, p. 26: "(2) Under H.R. 5373, it is probable that local law would determine the liability of the United States in suits on tort claims, but nothing is said of administrative settlements. H.R. 6463 makes it clear that local law applies to the administrative determination of such claims as well as to suits thereon. Uniformity in this respect is obviously desirable. . . ."

With respect to suits on tort claims it is stated, p. 26: "Local law is to govern not only the matter of liability but also such defenses as contributory negligence, aggravation of damages, and the like, and the beneficiaries entitled to distribution of the recovery in death cases. . . ."

In distinguishing between H.R. 6463 and H.R. 5373 with respect to litigation of tort claims against the United States, it is said, p. 27: "(2) Conformance to local law is called for by H.R. 6463, not only in respect to the merits of the claim, but also in respect of the availability of defenses and the distribution or disposition of the recovery in cases of death. . . ."

In showing how the bills differed with respect to exemptions of Government liability, it is stated at p. 29: "(1) (ii) Claims arising in a foreign country have been exempted from H.R. 6463, whether or not the claimant is an alien. *Since liability is to be determined by the law of the situs of the wrongful act or omission,* it is wise to restrict the bill to claims arising in this country." (Emphasis added.) It is noteworthy that the words "situs of the tort" or "situs of the injury" were not used, but instead the place of conduct language.

[33] *Supra,* note 32, pp. 30, 35. In a prior statement by Mr. Shea, *Hearings,* etc., p. 9, in response to a question as to the venue of such actions, he said, "Either where the claimant resides, or in the locale of the injury or damage." This is the language which apparently compelled Judge Miller in his partial dissent in the *Union Trust* case, *supra,* to conclude that the *consequence* of the negligent act or omission is to be considered in determining the applicable law. However, Mr. Shea's subsequent testimony on the applicable law during these hearings, pp. 30-36, the written statement introduced at the Hearings, pp. 24-30, and the bill itself

"The Chairman. You may go ahead.

Mr. Shea. H.R. 6463, insofar as it relates to administrative settlements, permits the Federal agencies to consider and determine claims for death, as well as for personal injury and property damage, which was not provided for in the other bill (H.R. 5373).

Under the other bill it was not specifically provided that local law should govern, and certain express provisions were made, for instance, as to distributions.

Mr. Celler. Do you need that? Is that necessary to express it?

Mr. Shea. I should think the earlier bill would probably be construed as applying the local tort law, but this bill specifically covers it, leaving the distribution in case of death and so forth to the local law.

Mr. Celler. The only trouble is in future bills you may have to put that precedent in. If you leave it out the courts may not construe it should apply. I am only thinking out loud to get your reaction.

Mr. Shea. This bill provides explicitly for the application of local law.

The Chairman. Go ahead.

Mr. Shea. . . . Title III provides for suits in the district courts. It differs from the earlier bill in that the liability of the United States in such cases is to be the same as that of a private individual, subject to the limitations of the bill and is to be reviewable by the Court of Claims, which we have discussed. Conformance to local law is explicitly provided for here, as it was not in the prior bill."

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as set forth on pp. 1-6 of the Hearings, make no further reference to such language. In view of the numerous references to the "place of conduct" language and "local law", *supra*, nn. 31-32, it is submitted that the intent of Congress was to apply the law of the state in which the conduct occurred.

It is submitted that such unambiguous and consistent reference to law of the place where the negligent act or omission occurs, evidences clear congressional intent that the Government's liability was intended to be determined in accordance with that law.

The provision of 28 U. S. C. §2674, that the Government shall be liable "in the same manner and to the same extent as a private individual in like circumstances," does not lead to a contrary result. This is clear from the plain meaning of the Act. Counsel for respondent, American Airlines, Inc., argued in the courts below that if Oklahoma law were applied to determine the Government's liability, such liability would not be determined in the same manner and to the same extent as a private individual in like circumstances. The Act, however, clearly dictates that the remedy shall not, in every instance, be coextensive with that available against a private person. There are procedural and substantive differences and departures from the common law.[34]

These restrictions and limitations upon the remedy conferred by the Act, evidencing wide variances from the relief obtainable against a private person is similar circum-

[34] Claimants can only sue in the federal courts, § 1346(b); the Act prescribes its own period of limitations which may be shorter or longer than that of the state in which the tort occurs, § 2401(b), see State of Maryland, to use of Burkhardt v. United States, 165 F. 2d 869 (4th Cir. 1947); the claimant cannot obtain a trial by jury under the Act, although he could against a private defendant, § 2402; he cannot obtain punitive damages under the Act, even though state law may provide for it as against a private defendant, § 2674, see, Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 128; he cannot obtain interest prior to judgment under the Act, regardless of the state rule governing private defendants, § 2674; the Act excludes claims based on numerous types of torts for which a private person is answerable, § 2680; and the Act exempts the Government from liability for claims based on various types of activities, although a private person would be liable in the same circumstances, § 2680.

stances, simply illustrate the settled principle that in consenting to suit against the Government, Congress may impose any conditions it chooses upon the right to sue and upon the nature of the remedy. The Tort Claims Act's requirement of application of the law of the place where the act or omission occurred, rather than the application of the law of the place of the act's consequences, is but another variance which Congress chose to insert.

In its opinion the Court of Appeals expressly recognized this principle, *viz,* that the Tort Claims Act provided its own choice-of-law rule and that the Act was not silent in this area. It also acknowledged that Congress took effective action to make a *different* rule applicable to the Government in cases involving multi-state torts. Yet, it completely ignored the plain meaning of the language actually used by Congress. Instead, it said it was "committed" to a rule which is nearly always applied in multi-state tort actions between private parties. It is submitted, therefore, that this complete disregard of the congressional mandate on the law to be applied in such cases was clearly error.

III.

By applying the Oklahoma conflict of laws rule and the rule that the Oklahoma wrongful death statute can have no extraterritorial application to a death occurring in another state, the Courts below completely negated the intent of Congress to determine the liability of the Government in accordance with the law of the place where the act or omission occurred.

By express provision of the Act,[35] its terms and conditions can only be applied in civil actions wherein the United

[35] 28 U.S.C. § 1346(b). "Subject to the provisions of Chapter 171 . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . ."

States is the defendant. It has no application to actions between private persons. The Act does not create a new cause of action.[36] It merely waives sovereign immunity from suit for certain torts of federal employees.[37] The primary purpose of the Act was to extend a remedy to those who had been without one.[38] Although the State of Oklahoma created a statutory right and a remedy to recover damages for wrongful death[39] in actions against private defendants, it is plain that it did not and could not provide such a remedy to those persons having wrongful death claims against the United States of America. Only Congress could provide that remedy, which it did in enacting the Federal Tort Claims Act.[40]

It is clear, therefore, that the application of the Oklahoma wrongful death statute to petitioners' claims in accordance with the language of the Tort Claims Act, does not change in any manner the established law prevailing in Oklahoma concerning its wrongful death statute. The courts in Oklahoma, and the federal district courts in diversity actions, will still be free to apply the Oklahoma conflict of laws rule, or its rule as to non-extraterritorial application of its death statute, in a wrongful death action against private defendant based upon a death occurring in Missouri. The mere fact that Congress chose to make a different rule apply in the federal courts to actions commenced against the Government should be of no concern to the State of Oklahoma, or any other state for that matter, since in so doing, Congress did not intend the Act to affect the states' jurisdiction in such actions against private defen-

[36] Feres v. United States, 340 U.S. 135, 141 (1950).

[37] Dalehite v. United States, 346 U.S. 15, 17 (1953).

[38] *Supra*, note 36, at 140.

[39] F. W. Woolworth Co. v. Todd, 204 Okl. 532.

[40] *Supra*, note 38.

dants. Therefore, with respect to wrongful death actions against the Government under the Tort Claims Act, it would not make any difference what construction the state courts would give to the application of its death statutes where a death occurs in another state, because Congress chose to make a different rule applicable to the Government in such actions.[41]

It would be difficult to conceive that Congress, at the time this Act was passed, did not have in mind the general rule of conflict of laws[42] usually applied in such cases by most jurisdictions. It would be equally difficult to impute to that body any suggestion that it did not know that few, if any, state wrongful death statutes have any extraterritorial application. If, therefore, Congress intended to have the Government's liability depend upon the general conflict of laws rule or the extraterritorial effect of the wrongful death statute of the state where the negligent act occurred, the Tort Claims Act would be inapplicable in all actions involving multi-state torts. Surely, Congress could not have intended to provide the remedy to one class of claimants and withhold it from another.

Yet, this result stems from the holdings of the Courts below in the instant actions. Petitioners have been denied the opportunity to obtain a determination of the merits of their respective claims against the United States in accordance with the clear intent of Congress as contained in the Federal Tort Claims Act. In short, the remedy provided by Congress has been withheld from petitioners because the deaths of their respective decedents did not occur in the same state in which the Government was negligent.

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[41] State of Maryland, to use of Burkhardt v. United States, 165 F. 2d 869 (4th Cir. 1947).

[42] See, e.g., Hunter v. Derby Foods, 110 F. 2d 970 (2d Cir.), Restatement, *Conflict of Laws*, §§ 377-78 (1934); Goodrich, *Conflict of Laws*, 263-64 (1949).

PRAYER

For the foregoing reasons, petitioners pray that this petition be granted to the end that these cases may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed, and that petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

SUZANNE THOMAS RICHARDS,
HARVEY BARUCK,
CLARINE FAROUGH,
BERNICE L. MAUPIN,
MARGARET J. HOWE,
ELIZABETH R. CROSS,
THERESE B. AKIN,
ALTHEA S. GATES,
RUTH JEAN CARR-HARRIS
ANNA MAE O'NEAL,
MARGARET EMMA BARBON,
MYRA FIELDS,
VIRGINIA HOBSON,
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By EDWARD M. O'BRIEN, and
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APPENDIX

28 U. S. C. §1346(b) provides as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. §1402(b) provides as follows:

> Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. June 25, 1948. c. 646. 62 Stat. 937.

28 U. S. C. §2672 provides, in pertinent part, as follows:

> The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or

death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. §2674 provides as follows:

LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

12 Okl. St. Ann. §1053, provides as follows:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving

spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased. As amended Laws 1943, p. 35, § 1.

Chapter 537 V. A. Mo. S. §537.080 (Section 3653, R. S. Mo. 1939), provided on August 4, 1955, as follows:

LIABILITY FOR WRONGFUL DEATH GENERALLY

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. (R. S. 1939, §3653)

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 6378 to 6391—November Term, 1960

(Argued September 14, 1960 Decided November 25, 1960)

Docket Nos. 6378-6391

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Appellees.

(November 25, 1960)

JOSEPH A. SHARP (Speiser, Quinn & O'Brien, Edward M. O'Brien; Rucker, Tabor, Best, Sharp & Shepherd, Truman B. Rucker and O. H. "Pat" O'Neil were with him on the brief) *for Appellants.*

SHERMAN L. COHN, Department of Justice Attorney, (George Cochran Doub, Assistant Attorney General; B. Hayden Crawford, United States Attorney; and Morton Hollander, Department of Justice Attorney, were with him on the brief) *for Appellee, United States of America.*

FRED M. MOCK (W. B. Patterson and Melvin F. Pierce were with him on the brief) *for Appellee, American Airlines, Inc.*

Before MURRAH, *Chief Judge*, and BRATTON and PICKETT, *Circuit Judges*.

BRATTON, *Circuit Judge*.

A passenger airplane owned and operated by American Airlines on a regularly scheduled flight crashed in Missouri and everyone on board was killed. Invoking pertinent provisions of the Federal Tort Claims Act, 28 U. S. C. §§1346, 1402, and the so-called Wrongful Death Statutes of Oklahoma, O.S. 1951, Title 12, chapter 17, §1051, *et seq.*, survivors or legal representatives of passengers who lost their lives instituted in the United States Court for Northern Oklahoma fourteen separate actions against the United States for the recovery of damages. The basis of the claim pleaded in each case was negligence on the part of the United States, acting through the Civil Aeronautics personnel, in permitting American Airlines to employ and use unsafe practices and procedures at its overhaul depot at Tulsa, Oklahoma, in repairing, rebuilding, overhauling, and inspecting its aircraft, aircraft engines, and component parts. More specifically, it was pleaded that as the result of such negligence, an unfit and unsafe cylinder was placed in one of the engines of the airplane at the overhaul depot; that the cylinder failed; and that such failure caused the crash. The United States denied negligence; denied liability; pleaded that the accident was an unavoidable casualty; pleaded that the complainants were barred from recovery against the United States by reason of payments made to them by American Airlines and releases given to such company; and pleaded in the alternative that the amounts paid should be taken into account in mitigation of

damages against the United States. And by third party complaints, the United States asserted against American Airlines a right of indemnity in the event of recovery against the United States. American Airlines pleaded that the complaints failed to state a cause of action against the United States; pleaded that the deaths were an unavoidable casualty; pleaded that the actions were barred by the statutes of limitation of Missouri; and pleaded that certain of the complainants were barred from recovery against the United States by reason of releases given to American Airlines. The actions were consolidated for trial. In some of the cases, American Airlines made payment in each case of $15,000 to the complainants and releases and satisfactions of liability were executed. In the other cases, American Airlines during the course of a pre-trial conference tendered to the complainants in each case $15,000. Following the pre-trial conference, findings of fact and conclusions of law were made; and judgments were entered dismissing the actions.

The cases present a situation in which the alleged wrongful acts and conduct on the part of the United States occurred in Oklahoma and the deaths of the decedents occurred in Missouri. While it would be trite in ordinary circumstances to do so, it may be appropriate in this case to say that, in the absence of a controlling statute providing otherwise, the general rule is that where an act of omission or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place. *Betts* v. *Southern Railway Co.*, 71 F. (2d) 787; *Hunter* v. *Derby Foods*, 110 F. (2d) 970; *Lowry* v. *International Brotherhood, etc.*, 220 F. (2d) 546; *Eastern Air Lines* v. *Union Trust Co.*, 221 F. (2d) 62, certiorari denied, 350 U. S. 911; *Orr* v. *Sasseman*, 239 F. (2d) 182; *Cameron* v. *Vandegriff*,

53 Ark. 381, 13 S. W. 1092; *Strogoff* v. *Motor Sales Co.*, 302 Mass. 345, 18 N. E. (2d) 1016; *Dallas* v. *Whitney*, 118 W. Va. 106, 188 S. E. 766; *Conklin* v. *Canadian-Colonial Airways*, 266 N. Y. 244, 194 N. E. 692; *Hughes Provision Co.* v. *La Mear Poultry & Egg Co.* (Mo. App.), 242 S. W. (2d) 285; *Gaston* v. *Wabash Railroad Co.* (Mo.), 322 S. W. (2d) 865; *Mann* v. *Policyholders' National Life Insurance Co.*, 78 N. D. 724, 51 N. W. (2d) 853. See also Restatement, Conflict of Laws §377. And that rule has been applied in cases in which the act of omission or commission in respect to a passenger airplane occurred at one place while the resulting accident and death took place at another. *Faron* v. *Eastern Airlines*, 84 N. Y. S. (2d) 568; *Riley* v. *Capital Airlines*, 199 N. Y. S. (2d) 515. It is readily conceivable that solution of the problem could be more difficult in a case in which the initial act of omission or commission occurred at one place, personal injury at another, and resulting death later at a third. But no situation of that kind is presently presented.

If the Tort Claims Act were silent in respect to the matter and the general rule to which reference has been made had application with controlling effect, it seems clear that the situs of the actionable wrong involved in these cases would be in Missouri and the liability of the Government to respond in damages would be referrable to the substantive law of that state. But the Tort Claims Act is not silent in that area. For reasons of its own choice, Congress took effective action to make a different rule applicable to the Government in such cases. Title 28, section 1346(b), United States Code, authorizes suits against the Government for death caused by the negligent or wrongful act of an employee of the Government while acting within the scope of his employment if a private person would be liable in accordance with the law of the place at which such act or omission occurred. And Title 28, section 2674, provides in

presently pertinent part that the Government shall be liable in respect to the provisions of the title relating to tort claims in the same manner and to the same extent as a private person under like circumstances. When construed together, the effect of the two provisions in a case in which the act or omission occurs at one place and the resulting death at another is to subject the Government to liability according to the tests and standards of the substantive law of the state in which the act or omission occurred. Except when expressly provided otherwise in the Act itself, the effect of the two provisions in a case in which the act or omission occurs at one place and resulting death at another is to equate the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred. *Eastern Air Lines* v. *Union Trust Co., supra; Voytas* v. *United States,* 256 F. (2d) 786. Concededly, a contrary view was expressed in *United States* v. *Marshall,* 230 F. (2d) 183, and *Hess* v. *United States,* 259 F. (2d) 285, vacated on grounds not germane here, 361 U. S. 314. But we are persuaded that our view finds adequate support in the Act.

The Supreme Court of Oklahoma has had occasion to observe from time to time that at common law the wrongful death of a person did not create a right of action for damages; and that the right of action in that state is purely statutory. *F. W. Woolworth Co.* v. *Todd,* 204 Okl. 532, 231 Pac. (2d) 681; *Gochenour* v. *St. Louis San Francisco Railway Co.,* 205 Okl. 594, 239 Pac. (2d) 769; *Herndon* v. *Dolton-Barnard Hardware Co.* (Okl.), 289 Pac. (2d) 970; *Mathies* v. *Kittrell* (Okl.), 350 Pac. (2d) 951. The right of action in that state is created by 12 O.S. 1951 §1053. The statute provides in substance that when the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. ~~753~~ 59

SUZANNE THOMAS RICHARDS, nee Wadlow, individually and for the use and benefit of DEBRA SUE RICHARDS, ET AL.,
Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

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Dallas, Texas;

FRED M. MOCK,
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UTTERBACK TYPESETTING CO 13 SO WALKER OKLAHOMA CITY PH CE 5-8750

is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission; it further provides that the damages shall inure to the persons named; and it further provides the manner in which such damages shall be distributed. The statute in its entirety creates a new right of action, specifies the persons who may maintain the action, and blueprints the distribution of the damages recovered in the action. *Gochenour* v. *St. Louis San Francisco Railway Co., supra.* But it does not indicate directly or indirectly a legislative intent or purpose to undertake to create a cause of action for wrongful death occurring in another state. Neither does it suggest an intent or purpose to make it apply to actions brought in the courts of Oklahoma for wrongful death occurring outside the state. Standing alone, it is limited in effect to wrongful deaths which occur in Oklahoma. However, assuming that it is brought in the name of the proper party plaintiff, against the proper party defendant, with jurisdiction over the person of the defendant, a transitory action for wrongful death occurring in another state may be maintained in the courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy. An action of that kind in the courts of Oklahoma is not one under the domestic statute of Oklahoma relating to wrongful death. It is one for the enforcement of a right of action having its source in the law of the state in which the wrongful death occurred. *Chicago, Rock Island & Pacific Railway Co.* v. *McIntire,* 29 Okl. 797, 119 Pac. 1008; *McCoubrey* v. *Pure Oil Co.,* 179 Okl. 344, 66 Pac. (2d) 57; *Gochenour* v. *St. Louis San Francisco Railway Co., supra; Fenton* v. *Sinclair Refining Co.,* 206 Okl. 19, 240 Pac. (2d) 748.

It was pleaded in the complaints in these cases that the actions arose under the Tort Claims Act, *supra;* and that

they were brought under the Wrongful Death Statutes of Oklahoma, *supra*. No reference was made in the complaints to the laws of Missouri respecting wrongful death. But since the wrongful deaths pleaded in the complaints occurred in Missouri, we take occasion to explore the question whether a cause of action was pleaded for which the complainants were entitled to relief by way of damages under the laws of that state. A right of action for wrongful death exists by statute in Missouri. *Nelms* v. *Bright* (Mo.), 299 S. W. (2d) 483. Quite similar to the wrongful death statute of Oklahoma, *supra*, at the time of the airplane crash referred to herein, it was provided by statute in Missouri that when the death of a person was caused by a wrongful act, neglect, or default of another, and such act, neglect, or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages therefor, an action for damages might be maintained, notwithstanding the death of the person injured. R. S. Mo. 1939, §3653. And at the time of such airplane crash, it was further provided by statute in Missouri that damages not to exceed $15,000 might be awarded for wrongful death. R. S. Mo. 1939, §3654. No limitation in respect to amount of damages is provided by statute in Oklahoma. But in creating the statutory right of action for wrongful death, it was competent for Missouri to fix the maximum amount of damages recoverable in an action under such statute. And this court is committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered. *Stoltz* v. *Burlington Transportation Co.*, 178 F. (2d) 514, certiorari denied, 339 U. S. 929; *Burlington Transportation Co.* v. *Stoltz*, 191 F. (2d) 915.

The maximum recovery of damages under Missouri law at the time of the airplane crash being $15,000, payment of that amount to the complainants in some of these cases and the deposit of that amount in the registry of the court in the other cases, constituted full satisfaction for the wrongful deaths, the causes of action under the law of Missouri became extinguished, and recovery against the tort feasor or tort feasors was barred. *Hanson* v. *Norton*, 340 Mo. 1012, 103 S. W. (2d) 1.

The judgments of dismissal are severally affirmed.

MURRAH, *Chief Judge*, dissenting:

I agree that the government is liable in these cases as a private person in accordance with Oklahoma law, i.e., the place where the alleged negligent act or omission occurred. I also agree that the inapplicability of the Oklahoma wrongful death statute to deaths outside the state does not preclude the right to recover in cases like these, even though a private person would not be liable according to Oklahoma law under the same circumstances.

We know that few, if any, state wrongful death statutes have any extraterritorial effect. If, therefore, the right to recover under the Tort Claims Act in cases like these is made to depend upon the extraterritorial effect of the wrongful death statute of the place of the negligent act, the Act would be inapplicable to all such cases. Surely Congress did not intend any such anomalous result.

The majority avoids this blind spot in the law by resort to the Oklahoma conflict of laws rule, which authorizes maintenance of a suit in Oklahoma for wrongful death occurring outside the state, in accordance with the law of the state where death resulted. And see *Fenton* v. *Sinclair Refining Co.*, 240 P. 2d 748. The effect of this process of reasoning is to apply the substantive law of the place of death rather than the law of the place of the negligent act.

The end result seems contrary to our agreed interpretation of the Tort Claims Act. Indeed, under this theory, these suits might have been instituted and maintained in any forum which authorizes them, with liability governed by the law of the place where death occurred, i.e., Missouri. Thus, if the suits had been commenced in Missouri, the Missouri court would have looked to the law of Oklahoma as the place where the negligent act occurred, and the Oklahoma conflicts rule would apply the law of Missouri as the place where death occurred.

In my view, Congress intended to avoid this circuitous stacking of one conflicts rule on another in order to arrive at controlling substantive law. Rather, it is my view that the Tort Claims Act provides its own conflicts rule, that is, the law of the place of the negligent act. In other words, we rest upon the law of that state and look no further. If Congress had intended otherwise, it could have simply conferred jurisdiction upon the courts to hear and decide claims for damages for death caused by the negligence of the United States "under circumstances where the United States, if a private person, would be liable to the claimant" and stopped there. In this setting, these suits would be maintainable in Oklahoma in accordance with the law of Missouri, by virtue of the Oklahoma conflicts rule, that is, the law of the place where the accident occurred. When, however, Congress went on to say in effect that the government would be liable to the claimant as if a private person "in accordance with the law of the place where the act or omission occurred," it thereupon removed the traditional cloak of immunity and left the government standing as a private person, but prescribed the law and the conditions under which it would become liable.

Such is the import and result of *Eastern Airlines* v. *Union Trust Co.*, 221 F. 2d 62. I would follow the majority view in that case and apply the Oklahoma wrongful death statute.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Tenth Day, November Term, Friday, November 25th, 1960.

Before:

HON. ALFRED P. MURRAH,
Chief Judge,

HON. SAM G. BRATTON,
HON. JOHN C. PICKETT,
Circuit Judges.

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Appellees.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgments of dismissal are severally affirmed.

ROBERT B. CARTWRIGHT
Clerk

Judgment

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil Action Nos. 4272 through 4285

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Plaintiffs,

—VS.—

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES OF AMERICA,

Third Party Plaintiff,

—VS.—

AMERICAN AIRLINES, INC.,

Third Party Defendant.

Findings of Fact

In accordance with the stipulations heretofore entered into between the parties, the Court finds as follows:

I.

That the suits by plaintiffs against United States of America allegedly arise under the terms of the Federal Tort Claims Act, 28 U. S. C. 1346 et seq. and allegedly are

brought under the Oklahoma Wrongful Death Statute, to wit: 12 O.S. Sec. 1051, et seq.

II.

That, in the actions brought by plaintiffs against American Airlines, there is diversity of citizenship between the parties.

III.

Convair Airplane 240, registration No. N-94221, was owned and operated by American Airlines and, on the 4th day of August 1955, was being operated by American Airlines as Flight 476 when it crashed at Fort Leonard Wood, Missouri.

IV.

That, at the time of the crash, the airplane was being operated by Captain Hugh Barron, as pilot, and William Grover Gates, as co-pilot. That Hugh Barron and William Grover Gates were employees of American Airlines at the time of the crash and were fatally injured as a result of the crash.

V.

That Harold M. Fields, Morris W. Akin, Kurt D. Richards, Samuel H. Hobson, Robert I. Zelens, John Leland Cross, Jr., James Howe, Wayne Howe, Donald L. Carr-Harris, Virgil D. Maupin, Tilson J. Farough, Herman F. Schmyser and William E. O'Neel were all fare paying passengers, lawfully aboard American Airlines Flight 476, and all perished in the crash occurring at Fort Leonard Wood, Missouri.

VI.

That the death of the crew members and all fare paying passengers occurred within the State of Missouri.

VII.

That plaintiffs allege negligence on the part of the United States of America, occurring prior to the 4th day of August, 1955, at the American Airlines Overhaul Depot located at Tulsa, Oklahoma, which they allege was the proximate cause of the crash and deaths of the members of the crew and fare paying passengers.

VIII.

That plaintiffs have received full satisfaction of any cause of action they may have under the terms and provisions of the Wrongful Death Statute of the State of Missouri.

Conclusions of Law

In accordance with the above Findings of Fact, the Court determines as follows:

I.

The Court has jurisdiction of the parties and the subject matter of these actions.

II.

In the actions by plaintiffs against the United States of America, the provisions of the Federal Tort Claims Act, 28 U. S. C. 1346(b) et seq. are applicable.

III.

It is unnecessary to decide whether the law applicable to the plaintiffs' claims against the United States of America is that of the State of Missouri or the State of Oklahoma, for in either case the plaintiffs have no actionable claims against the United States of America.

IV.

There is no cause of action under the Oklahoma Wrongful Death statute where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri.

V.

If Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including its conflicts of law rule, is applicable thereunder.

VI.

The Oklahoma conflicts of law rule requires that in the circumstances of these cases the plaintiffs' claims be determinable by reference to the Missouri Wrongful Death statute.

VII.

The plaintiffs have no further claims under the Missouri Wrongful Death Statute for the reason that they have already received full satisfaction of any claims they might have thereunder.

VIII.

The complaints in the above action should be dismissed with prejudice.

IX.

Since the complaints against the United States are to be dismissed, it is unnecessary to pass upon the third party complaints asserted by the United States against American Airlines.

Order of Judgment

In accordance with the above findings of fact and conclusions of law, the complaints in the above actions are hereby dismissed with prejudice.

RAYMOND H. SAVAGE
Judge

Approved:

SPEISER, QUINN & O'BRIEN
RUCKER, TABOR & COX

By JOSEPH A. SHARP
Attorneys for Plaintiffs

RHODES, CROWE, HIERONYMUS & HOLLOWAY

By
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ROBERT RIZLEY
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By RUSSELL H. SMITH
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PIERCE, MOCK & DUNCAN, COUCH & HENDRICKSON
JACKSON, WALKER, WINSTEAD, CARTWELL & MILLER

By W. B. PATTERSON
Attorneys for American Airlines, Inc.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OKLAHOMA, *ss*

I hereby certify that the foregoing is a true copy of the original on file in this court.

NOBLE C. HOOD, Clk.

By M. M. Ewing
Deputy

SUBJECT INDEX

	PAGE
Reasons Urging Why Petition Should Be Denied	2
Argument	2
I. There is no conflict between the decision of the Court of Appeals in this case and decisions of other Courts of Appeal respecting the same issues	2
II. No question of importance is presented to the Court	4
Conclusion	6

APPENDIX

Bolivian Air Crash Cases	i
Stipulation	ii-vi

AUTHORITIES

CASES:

Cook v. United States (C.C.A. 2nd), 274 F.2d 689	4
Eastern Airlines v. Union Trust Company (App. D.C.), 221 F.2d 62, cert. denied on the application of Union Trust Company (complainant in the trial court), 350 U.S. 911, 76 Sup. Ct. 192, 100 L. Ed. 799, holding applicable the Virginia Wrongful Death Statute	2-3, 4, 6
Hess v. United States (C.C.A. 9th), 259 F.2d 285, reversed on other grounds, 361 U.S. 314, 80 Sup. Ct. 341, 4 L. Ed.2d 305	4, 5
Knecht v. United States (C.C.A. 3rd), 242 F.2d 929	5
Richards v. United States (C.C.A. 10th), — F.2d —	2, 3, 4, 5, 6

INDEX CONTINUED

PAGE

United States v. Marshall (C.C.A. 9th), 230 F.2d 183 ..... 3, 4, 6

Voytas v. United States (C.C.A. 7th), 256 F.2d 786 ..... 4, 5

STATUTES:

Federal Tort Claims Act, 28 U.S.C., Secs. 1346(b), 2674 2

Oklahoma Wrongful Death Act, Title 12, O.S., Sec. 1051 et seq. 2

In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 753

SUZANNE THOMAS RICHARDS, nee Wadlow, individually and for the use and benefit of DEBRA SUE RICHARDS, ET AL.,
Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Respondent American Airlines, Inc., urges that the petition be denied for the following reasons:

I.

There is no conflict between the decision of the Court of Appeals in this case and decisions of other Courts of Appeal respecting the same issues.

II.

No question of importance is presented to the Court.

ARGUMENT

I.

There is no conflict between the decision of the Court of Appeals in this case and decisions of other Courts of Appeal respecting the same issues.

In deciding this case adversely to the petitioners,[1] the United States Court of Appeals for the Tenth Circuit construed the Federal Tort Claims Act[2] to mean that the waiver of immunity in suits for tort against the United States was controlled by and referable to the substantive law of that state in which the negligent act or omission complained of had occurred.[3] The same construction was given the Act by the United States Court of Appeals for the District of Columbia in the case of *Eastern Airlines* v.

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[1] *Richards* v. *United States* (C.C.A. 10th), — F.2d —, contained in the Appendix to petitioners' brief, pp. 30-38.

[2] Federal Tort Claims Act, 28 U.S.C., Secs. 1346(b), 2674.

[3] The decision, that the substantive law involved in this controversy, the Oklahoma Wrongful Death Act, Title 12, O.S., Sec. 1051 *et seq.*, has no extra-territorial application, certainly does not conflict with the decision of any case cited by petitioners.

Union Trust Company.[4] The only other decision directly bearing upon this question was the case of *United States* v. *Marshall,*[5] wherein the United States Court of Appeals for the Ninth Circuit construed the Act to determine the law applicable to such an action by reference to the entire law, including the rule of conflict of laws, of that state wherein the negligent act or omission occurred. The apparent conflict between the decision in this *Marshall* case, when compared to the decisions of the Tenth Circuit Court of Appeals[6] and the District of Columbia Court of Appeals,[7] is seen more as a difference of form, rather than of substance, when the results of the cases are analyzed and compared.

It is obvious that both the Tenth Circuit Court of Appeals, herein, and the Ninth Circuit Court of Appeals[8] recognized and held applicable to the Federal Tort Claims Act the rule of conflict of laws found in that state wherein the negligent act or omission of the Government was alleged to have occurred. That was the basis of the decision of the *Marshall* case; it was recognized, but held to be moot, in the decision of the *Richards* case by the Tenth Circuit Court of Appeals.

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[4] *Eastern Airlines* v. *Union Trust Company* (App. D.C.), 221 F.2d 62, *cert. denied* on the application of Union Trust Company (complainant in the trial court), 350 U.S. 911, 76 Sup. Ct. 192, 100 L. Ed. 799, holding applicable the Virginia Wrongful Death Statute.

[5] *United States* v. *Marshall* (C.C.A. 9th), 230 F.2d 183.

[6] In *Richards* v. *United States, supra.*

[7] In *Eastern Airlines* v. *Union Trust Company, supra.*

[8] *United States* v. *Marshall, supra.*

In the *Eastern Airlines* case[9] the litigants stipulated that the Wrongful Death Statute of either the District of Columbia or the Commonwealth of Virginia would be applicable and determinative of their respective rights[10]:

> "The final decision in the *Miller* cases on the (a) question of liability of the various defendants named in the *Miller* cases, and (b) the question as to whether the *Wrongful Death Statute* of the District of Columbia or the Commonwealth of Virginia is applicable, shall be conclusive and binding on these issues upon all of the parties to this stipulation in each of the cases captioned above" (Italics supplied).

This stipulation between the litigants was recognized and adhered to by the Court in the decision of Cook v. *United States*.[11]

II.

No question of importance is presented to the Court.

The Federal Tort Claims Act has been in existence since the first day of January, 1945, a period of some fifteen years. Petitioners herein have cited only five cases involving, even remotely, a multi-state tort.[12]

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[9] *Eastern Airlines* v. *Union Trust Company, supra.*

[10] Appendix, pp. i-vi, *infra.*

[11] *Cock* v. *United States* (C.C.A. 2nd), 274 F.2d 689; another of the *Miller* or *Eastern* cases (*i.e.*, arising out of the same controversy).

[12] *Eastern Airlines* v. *Union Trust Company, supra; Marshall* v. *United States, supra; Hess* v. *United States* (C.C.A. 9th), 259 F.2d 285, reversed on other grounds, 361 U.S. 314, 80 Sup. Ct. 341, 4 L. Ed.2d 305; *Voytas* v. *United States* (C.C.A. 7th), 256 F.2d 786; *Richards* v. *United States, supra.*

This Court expressly held in *Hess* v. *United States* that the issue of a multi-state tort was not involved.[13]

It is clear that the *Voytas*[14] case was not decided upon this issue, simply holding that, irrespective of the applicability of either the law of Illinois or the law of Virginia, the plaintiff could not recover—no duty had been breached by the Government under the laws of either state.

Thus the only three decisions remaining during this period of fifteen years are the decisions of the *Marshall*, *Eastern*, and *Richards* cases, all of which hold that the law to be applied in a Federal Tort Claims Act case is the law of the place where the act or omission occurred. Further, this record of fifteen years' experience under the Act is but a reflection (1) that the overwhelming majority of suits under the Act arise where the situs of the negligence, of the accident, and of the resulting damage is the same, being in one jurisdiction,[15] and (2) that even in those few instances where negligence is alleged to have occurred in one jurisdiction, with injury or death resulting in another, the uniformity of the laws among the several states renders the apparent conflict a distinction without a legal difference. It is only in those infrequent, rare occasions, as here,

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[13] *Hess* v. *United States*, 361 U.S. 314; the notation at p. 318 reads: "This case does not involve the question that would be presented if wrongful conduct occurring within the territory of one political entity caused injury or death within a different political entity. Cf. *Eastern Airlines* v. *Union Trust Company*, 95 U.S.App. 189, 221 F.2d 62."

[14] *Voytas* v. *United States*, *supra*.

[15] *Knecht* v. *United States* (C.C.A. 3rd), 242 F.2d 929.

where a statutory provision of one state would give a significant difference to the remedy, that the question will arise.

CONCLUSION

The decisions of the various United States Courts of Appeal, with reference to the applicable law when wrongful conduct occurs in one political entity, and injury or death results in another, uniformly and unanimously hold that the law of the place where the act or omission occurred, or the situs of the wrongful conduct, is applicable.

By reason of the stipulation between the litigants in the *Eastern Airlines* case,[16] the United States Court of Appeals for the District of Columbia was not required to consider, and did not decide, any issue concerning the extra-territorial application of the Virginia Wrongful Death Statute, nor the application of the conflicts of law rule of the Commonwealth of Virginia.

The *Richards* case[17] held that the Wrongful Death Act of Oklahoma contained no provision for extra-territorial application, but recognized and approved the holding of the *Marshall* case[18] concerning the applicability of the conflicts of law rule of the state where the wrongful conduct occurred.

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[16] *Eastern Airlines* v. *United States, supra.*

[17] *Richards* v. *United States, supra.*

[18] *Marshall* v. *United States, supra.*

The extreme infrequency of an occurrence such as that involved herein, and the unlikelihood of future, similar occurrences, renders the question posed by petitioners unimportant.

The position of petitioners, in substance, is merely that they are dissatisfied with the decisions below; and here they only seek appellate relief.

Respondent American Airlines, Inc., respectfully submits that the Petition for Writ of Certiorari should be denied.

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Dallas, Texas;

FRED M. MOCK,
MELVIN F. PIERCE,
First National Building,
Oklahoma City, Oklahoma,

Attorneys for Respondent,
American Airlines, Inc.

APPENDIX

BOLIVIAN AIR CRASH CASES

(1) Nora Bates, Administratrix of Estate of George L. Bates Plaintiff vs. Eastern Airlines, Inc. Erick Rios Bridoux Paul M. Aubin and L. G. Lyons, Copartners, Trading as Universal Air and Marine Supply Co. Defendants	C.A. No. 2930-50	D.C. D.C.
(2) Porter Sims, Executor of Estate of Elizabeth S. Bent Plaintiff vs. United States	C.A. No. 4681-50	D.C. D.C.
(3) Porter Sims, Executor of Estate of Elizabeth S. Bent Plaintiff vs. Eastern Airlines, Inc. Erick Rios Bridoux Paul M. Aubin and L. G. Lyons, Copartners, Trading as Universal Air and Marine Supply Co. Defendants	C.A. No. 4397-50	D.C. D.C.

(4) Porter Sims, Executor of Estate of Elizabeth S. Bent, Plaintiff vs. United States of America, Defendant	C.A. No. 543	D.C. E.D. Va.
(5) Mildred Casey, Administratrix of the Est. of William J. Casey, deceased, Plaintiff vs. United States of America, Defendant	C.A. No. 61-364	D.C.S.D. N.Y.

STIPULATION

WHEREAS, all of the death actions captioned above arise out of a mid-air collision between an Eastern Air Lines passenger plane and a P-38 plane operated by Eric Rios Bridoux, which took place on November 1, 1949, when both planes were approaching Washington National Airport and involve among other issues, two issues which are common to all of the captioned cases, viz., (1) the liability of the respective defendants, and (2) whether the applicable wrongful death statute is that of the Commonwealth of Virginia or that of the District of Columbia.

Whereas, the following four actions (hereinafter referred to as the *Miller* cases) in the United States District Court for the District of Columbia, entitled,

Union Trust Company of the District of Columbia as Executor of the Estate of Mildred E. Miller, et al.,

-vs-

Civil Action No. 1892-50

Eastern Air Lines, Inc., Eric Rios Bridoux and Paul Aubin and L. C. Lyons, Co-partners, etc.

Union Trust Company of the District of Columbia as Executor of the Estate of Mildred E. Miller, et al.,

-vs-

Civil Action No. 4692-50

United States of America

Union Trust Company of the District of Columbia, as Executor of the Estate of Ralph F. Miller, deceased, et al.

-vs-

Civil Action No. 1893-50

Eastern Air Lines, Inc., Eric Rios Bridoux and Paul Aubin and L. C. Lyons, Co-partners, etc.

Union Trust Company of the District of Columbia, as Executor of the Estate of Ralph F. Miller, deceased, et al.

-vs-

Civil Action No. 4691-40

United States of America

are death actions which arise out of the same accident, are expected to be tried October 1952; and present the same two common issues, and;

WHEREAS, the parties hereto for the purpose of saving the time and expense which would be necessitated by separate and multiple trials of these two common issues

desire to make respective cases dependent upon and bound by such decision of those two issues as is finally made in the Miller cases;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties in each of the above-entitled cases, by and through their respective attorneys thereunto duly authorized, as follows:

1. No trial shall be had in any of the cases captioned above until the *Miller* cases have proceeded to final judgment and until all appeals, intermediate and final, have been had, or the time within which such appeals may be had has expired;

2. The final decision in the *Miller* cases on the (a) question of liability of the various defendants named in the *Miller* cases, and (b) the question as to whether the Wrongful Death Statute of the District of Columbia or the Commonwealth of Virginia is applicable, shall be conclusive and binding on these issues upon all of the parties to this stipulation in each of the cases captioned above;

3. Should the Court find in the *Miller* cases that the claims arose in Virginia and not in the District of Columbia, nothing in this stipulation shall be construed so as to prevent the United States from asserting in the above captioned cases, other than the *Miller* cases, the alleged defense that the United States District Court for the District of Columbia is without jurisdiction. Nor shall this stipulation be construed as an admission by any of the plaintiffs that a question of jurisdiction is presented.

4. Each counsel signing this stipulation thereby represents he has authority to bind the parties for whom he signs, and;

5. Upon approval of this stipulation by Judge Matthew F. McGuire of the United States District Court for the Dis-

trict of Columbia, it shall become binding upon all parties hereto.

/s/ Ross O'Donoghue
Ross O'Donoghue
Special Assistant to the Attorney General
Attorney for the defendant, U. S. A.

/s/ Richard W. Galiher
Richard W. Galiher
Attorney for defendant
Eastern Airlines, Inc.

/s/ Irene Kennedy
Irene Kennedy
Attorney for defendants,
Paul M. Aubin and L. G. Lyons

/s/ Cornelius H. Doherty
Cornelius H. Doherty,
Attorney for the plaintiff, Hartford
Accident and Indemnity Company
in captioned cases 56, 57

HOGAN & HARTSON
by /s/ Paul R. Connally
Attorney for the plaintiff,
Liberty Mutual Insurance Company in
captioned cases Nos. 29, 30, 31, 64,
65, 66, 67, 68, 69

NEWMYER & BRESS

by /s/ David G. Bress
David G. Bress
Attorney for the plaintiffs
in captioned cases 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58, 59, 60, 61, 62, 63, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 95, 96, 97, 101, 102, 103, 104, 106, 107.

Approved this 17th day of September, 1952.

/s/ Matthew F. McGuire
JUDGE

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INDEX

CITATIONS

CASES: Page

Allen v. *United States*, D. Ariz., Civ. 568-Pret. 7
Breyfogle v. *United States*, D.D.C., Civ. 2132-57 7
Burten v. *United States*, S.D.N.Y., 61 Civ. 492 8
Capital Airlines v. *United States*, D.D.C., Civ. 1238-59 7
Capital Airlines v. *United States*, D. Md., Civ. 11370 8
Clothier v. *United States*, E.D.N.Y., Civ. 61C-189 8
Dotzenroth v. *United States*, D.D.C., Civ. 3-61 8
Eastern Air Lines v. *Union Trust Co.*, 221 F. 2d 62, certiorari denied *sub nom. Union Trust Co.* v. *United States*, 350 U.S. 911 ..... 3-4, 5
Harms v. *United States*, D. Ariz., Civ. 566-Pret. 7
Hazelwood v. *United States*, D.N.J., Civ. 702-50 8
Hess v. *United States*, 259 F. 2d 285, reversed, 361 U.S. 314 3
Kemnitz v. *United States*, D. Ariz., Civ. 567-Pret. 7
Krusilla v. *United States*, C.A. 2, No. 26240, decided February 16, 1961 7
Landon v. *United States*, 197 F. 2d 128 5
Levin v. *United States*, D.D.C., Civ. 1554-57 8
Matland v. *United States*, 285 F. 2d 752 7
Maryland for use of Brady v. *United States*, D.D.C., Civ. 1237-59 8
Maryland for use of Brady v. *United States*, D. Md., Civ. 11369 8
Maryland for use of Dickson v. *Capital Airlines*, D. Md., Civ. 11386 8
Maryland for use of Dickson v. *Capital Airlines*, S.D. Ohio, Civ. 5548 8
Maryland for use of Gliedman v. *Capital Airlines*, D. Md., Civ. 11385 8
Maryland for use of Hunt v. *United States*, D. Md., Civ. 11376 8
Maryland for use of Johns v. *Capital Airlines*, W.D. Pa., Civ. 17541 8
Maryland for use of Levin v. *Capital Airlines*, D. Md., Civ. 11384 8
Maryland for use of Levin v. *Capital Airlines*, W.D. Pa., Civ. 17503 8
Maryland for use of Meyer v. *United States*, D.D.C., Civ. 1236-59 8

Page

Maryland for use of Meyer v. *United States*, D. Md., Civ. 11368 8
Maryland for use of Morgan v. *Capital Airlines*, E.D.N.Y., Civ. 19207 8
Miller v. *United States*, D. Del., Civ. 2207 7
Randall v. *United States*, D.D.C., Civ. 4688-50 8
Ray v. *United States*, D.N.J., Civ. 701-50 8
St. Clair v. *United States*, S.D.N.Y., Civ. 61-269 8
Ten v. *United States*, D. Md., Civ. 11393 8
United Air Lines v. *United States*, D. Del., Civ. 2043 7
United States v. *Marshall*, 230 F. 2d 183 ..... 2, 3
Voytas v. *United States*, 256 F. 2d 786 ..... 4, 5
Wilde v. *United States*, D. Ariz., Civ. 569-Prct. 7
Wood v. *United States*, S.D.N.Y., 60 Civ. 122 8

STATUTES:

28 U.S.C. 1346(b) 1, 2, 3
28 U.S.C. 2672 8
28 U.S.C. 2674 8

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 753

SUZANNE THOMAS RICHARDS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA and
AMERICAN AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This case presents an important question under the Federal Tort Claims Act with respect to the choice of law for determining the liability of the United States in cases where the government's negligence occurred in one state and the injury in another. Section 1346(b) of Title 28 U.S.C. provides that the government's liability for the negligence of its employees shall be determined "in accordance with the law of the place where the act or omission occurred." The instant case involves claims for wrongful death growing out of an airplane crash in Missouri allegedly caused

by the negligence of the United States in Oklahoma in failing to require adequate maintenance of the airplane there. The Court of Appeals for the Tenth Circuit held that Oklahoma was "the place where the act or omission occurred" but that "the law" of such place includes the conflict of laws rule of that state; and that since Oklahoma, in determining the measure of liability for wrongful death occurring outside the state, would look to the law of the state where the death occurred (Missouri in this case), 28 U.S.C. 1346(b) requires the application of the $15,000 limit imposed by Missouri law in wrongful death cases. In so holding, the court recognized (Pet. 34) that its position was contrary to that of the Ninth Circuit in *United States* v. *Marshall*, 230 F. 2d 183.

In view of (1) the direct conflict between the decision below and *Marshall*, (2) the conflicting views among the other circuits that have considered the question and (3) the growing importance of the issue in the administration of the Federal Tort Claims Act, we agree with petitioners that it is appropriate for this Court to decide the question. Accordingly, we do not oppose the petition for a writ of certiorari.

1. In *United States* v. *Marshall*, *supra*, a fire and explosion occurred on a railroad in Idaho as a result of a negligent act or omission that took place in Utah. The court held (230 F. 2d at 187) that the phrase "the law of the place where the act or omission occurred" in the Tort Claims Act "means the place where the negligence, either of act or omission, became operative, directly causing the injury and not places where the negligence existed but was then inoperative. Therefore, Idaho law would determine whether liability

exists as to the United States." The court in the *Marshall* case thus looked to the law of the place where the injury occurred, not the place where the negligence or omission took place, to determine the liability of the United States.[1]

In *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (C.A. D.C.), certiorari denied *sub nom. Union Trust Co.* v. *United States*, 350 U.S. 911, however, the Court of Appeals for the District of Columbia Circuit applied the law of the place where the negligent act occurred in determining the government's liability. That case involved an airplane crash in the District of Columbia that resulted from negligence found to have occurred in Virginia. District of Columbia law imposed no limit on recovery for wrongful death, but Virginia limited recovery to $15,000. The district court, applying District of Columbia law, entered a judgment against the United States for $150,000. The court of appeals held that since Section 1346(b) requires "the Government's liability to be measured under the law of the place where its negligent employee's

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[1] The court also stated (230 F. 2d at 187) that although the negligent act occurred in Utah, "the negligent condition created, continued into Idaho where the explosion occurred. The omission to use care occurred in Idaho as well as Utah."

In *Hess* v. *United States*, 259 F. 2d 285, 290, the Ninth Circuit, in a dictum, reiterated its view that the law of the place of injury rather than the place where the negligence occurred determines the liability of the United States. This Court, however, in reversing that case on other grounds (*Hess* v. *United States*, 361 U.S. 314, 318, n. 7) stated:

> This case does not involve the question that would be presented if wrongful conduct occurring within the territory of one political entity caused injury or death within a different political entity. Cf. *Eastern Air Lines* v. *Union Trust Co.*, 95 U.S. App. D.C. 189, 221 F. 2d 62.

act or omission occured," it "requires Virginia law to be applied in this case" (221 F. 2d at 80); and the court reduced the judgment to $15,000 "to meet the limitation imposed by the law of Virginia on the amount of recovery" (p. 81). The court of appeals did not discuss the problem presented in the instant case, namely, whether Virginia law, in determining liability for wrongful death occurring in another state, would have applied the measure of recovery permitted by such state. Judge Miller dissented on the choice of law issue. His view was that the phrase "in accordance with the law of the place where the act or omission occurred" "was intended to mean, and therefore should be construed as meaning, 'in accordance with the law of the place where the tort occurred.' An act, in legal as well as in popular use, is not merely a voluntary muscular contraction, but something more. The word commonly includes the consequences of the muscular contraction" (221 F. 2d at 80).

In *Voytas* v. *United States*, 256 F. 2d 786, the Court of Appeals for the Seventh Circuit similarly looked to to the law of the place where the negligent act occurred. The case involved an action for damages arising out of the theft of explosives by a soldier from his station at Fort Belvoir, Virginia, and the detonation of those explosives after the soldier gave them to a seventeen-year-old boy in Illinois. The court held that Illinois law controls as to any liability predicated upon the soldier's acts in Illinois, but that Virginia law would have to be looked to for a determination as to whether liability could be predicated upon the acts and omissions charged to the government at Fort Belvoir. *Id.* at 788, 789-90.

In *Landon* v. *United States*, 197 F. 2d 128, the Second Circuit applied the entire body of substantive law of the place where the negligent act occurred, including the conflict of laws rule. The question was whether damages for injury resulting from the government's negligence in New York should include medical expenses and wages for time lost where those items were paid not by the injured party but by his employer. The court concluded that the applicable law was that of New York, "the place where the negligent act occurred." 197 F. 2d 131. The court further held that since New York, in deciding this question, would follow the substantive law of New Jersey (the place of performance of the employment contract), the rule of the latter state should be applied in assessing damages under the Tort Claims Act. Judge Frank, dissenting, refused to follow the court in applying New York conflict-of-laws principles to refer to the substantive law of a place other than that in which the negligent act or omission occurred. He stated that "the Federal Tort Claims Act requires us, in matters affecting substantially the outcome of the litigation, to apply the New York decisional rule * * *." 197 F. 2d at 132.

In the instant case, the court below, citing the *Eastern Air Lines* and *Voytas* cases, *supra*, ruled that "in a case in which the act or omission occurs at one place and resulting death at another [the act] equate[s] the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred" (Pet. 34). The court went on, however, to hold that, as "a transitory action for wrongful death occurring in another state may be maintained in the

courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy" (Pet. App. 35), it would apply the substantive tort law of Missouri to determine the liability of the United States.

Chief Judge Murrah, dissenting, stated (Pet. 37-38) that "[t]he effect of this process of reasoning is to apply the substantive law of the place of death rather than the law of the place of the negligent act. The end result seems contrary to our agreed interpretation of the Tort Claims Act. Indeed, under this theory, these suits might have been instituted and maintained in any forum which authorizes them, with liability governed by the law of the place where death occurred, *i.e.*, Missouri. Thus, if the suits had been commenced in Missouri, the Missouri court would have looked to the law of Oklahoma as the place where the negligent act occurred, and the Oklahoma conflicts rule would apply the law of Missouri as the place where death occurred.

"* * * [I]t is my view that the Tort Claims Act provides its own conflicts rule, that is, the law of the place of the negligent act. In other words, we rest upon the law of that state and look no further. * * *"

Thus, the five circuits that have dealt with the choice of law problem in multi-state torts under the Tort Claims Act apply three different rules. The District of Columbia and the Seventh Circuits, Judge Frank of the Second Circuit, and Chief Judge Murrah of the Tenth Circuit would apply the substantive tort law of the "place where the act or omission occurred."

The Second and Tenth Circuits apply the *entire* "law of the place where the act or omission occurred," including its conflicts principles, even though that would result in measuring liability by the law of another state. The Ninth Circuit and Chief Judge Miller of the District of Columbia Circuit would apply the law of the place where the injury, *i.e.*, the tort, occurred, rather than the law of the place of negligence. Moreover, the Ninth Circuit suggested that, through a theory of continuing negligence, the terms of the statute might be reconciled with traditional concepts of conflict of laws. We believe that resolution by this Court of these divergent viewpoints is called for at this time.

2. Contrary to the statement of respondent American Airlines (Br. in Opp. 4-6), we believe that the question is an important one. In addition to the cases cited above, the problem arose in *Krusilla* v. *United States*, C.A. 2, No. 26240, decided February 16, 1961 (liability for a death in New Jersey as the result of medical malpractice in New York) and *Matland* v. *United States*, 285 F. 2d 752 (C.A. 3) (effect of a release executed in Pennsylvania and concerning an airplane crash in Arizona allegedly caused by negligence in California and Utah). The question is also likely to arise in many of the pending cases now before various district courts that involve injuries in one state resulting from alleged negligence in another.[2] Furthermore,

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[2] See, for example, *Allen* v. *United States*, D. Ariz., Civ. 568—Pret.; *Harms* v. *United States*, D. Ariz., Civ. 566-Pret.; *Kemnitz* v. *United States*, D. Ariz., Civ. 567-Pret.; *Wilde* v. *United States*, D. Ariz., Civ. 569-Pret.; *Miller* v. *United States*, D. Del., Civ. 2207; *United Air Lines* v. *United States*, D. Del., Civ. 2043; *Breyfogle* v. *United States*, D.D.C. Civ. 2132-57; *Capital Airlines* v. *United*

other provisions of the Tort Claims Act also refer to "the law of the place where the act or omission occurred." See 28 U.S.C. 2672 (administrative settlements); 28 U.S.C. 2674 (punitive damages).

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

APRIL 1961.

States, D.D.C. Civ. 1238-59; *Dotzenroth* v. *United States*, D.D.C. Civ. 3-61; *Levin* v. *United States*, D.D.C. Civ. 1554-57; *Maryland for use of Brady* v. *United States*, D.D.C. Civ. 1237-59; *Maryland for use of Meyer* v. *United States*, D.D.C. Civ. 1236-59; *Randall* v. *United States*, D.D.C. Civ. 4688-50; *Capital Airlines* v. *United States*, D. Md. Civ. 11370; *Maryland for use of Brady* v. *United States*, D. Md. Civ. 11369; *Maryland for use of Dickson* v. *Capital Airlines*, D. Md. Civ. 11386; *Maryland for use of Gliedman* v. *Capital Airlines*, D. Md. Civ. 11385; *Maryland for use of Hunt* v. *United States*, D. Md., Civ. 11376; *Maryland for use of Levin* v. *Capital Airlines*, D. Md. Civ. 11384; *Maryland for use of Meyer* v. *United States*, D. Md. Civ. 11368; *Ten* v. *United States*, D. Md. Civ. 11393; *Hazelwood* v. *United States*, D.N.J. Civ. 702-50; *Ray* v. *United States*, D.N.J. Civ. 701-50; *Clothier* v. *United States*, E.D.N.Y. Civ. 61C-189; *Maryland for use of Morgan* v. *Capital Airlines*, E.D.N.Y. Civ. 19207; *Burten* v. *United States*, S.D.N.Y. 61 Civ. 492; *St. Clair* v. *United States*, S.D.N.Y. Civ. 61-269; *Wood* v. *United States*, S.D.N.Y. 60 Civ. 122; *Maryland for use of Dickson* v. *Capital Airlines*, S.D. Ohio Civ. 5548; *Maryland for use of Johns* v. *Capital Airlines*, W.D. Pa. Civ. 17541; *Maryland for use of Levin* v. *Capital Airlines*, W.D. Pa. Civ. 17503.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., *et al.*,

Petitioners,

—against—

UNITED STATES *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~SECOND~~ Tenth CIRCUIT

BRIEF FOR THE PETITIONERS

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INDEX

PAGE

Opinions Below 1

Basis of Jurisdiction 1-2

Statutes Involved 2-4

Questions Presented 5

Statement of the Case 6-10

Summary of Argument 10-11

ARGUMENT:

I. The holding of the Court below completely negated the ordinary and plain meaning of the language employed by Congress to determine the liability of the United States under the Federal Tort Claims Act 12-24

II. The Application of the Oklahoma conflict of laws rule by the Court below defeated the legislative purpose to have the liability of the United States determined in accordance with the law of the place where the act or omission occurred 25-28

III. Since the choice of law in these actions is federal and not state, the application of the Oklahoma rule, that its death statute has no extraterritorial effect, was a complete disregard of the congressional purpose to have the liability of the Government determined in accordance with the law of the place where the act or omission occurred 29-33

PAGE

CONCLUSION 34

PRAYER 35

TABLE OF CASES CITED

American Banana Co. v. United Fruit Co., 213 U. S. 347 26

Baker v. Haldeman-Julius, 149 Kan. 560 25
Brotherhood of Railroad Trainmen v. Chicago, R. & I. R. Co., 353 U. S. 30 13
Burkett v. Globe Indemnity Co., 182 Miss. 423 26

Caldwell v. Gore, 175 La. 501 25-26

Dalehite v. United States, 346 U. S. 15 ..... 15, 21, 22, 32
Davies Warehouse Co. v. Bowles, 321 U. S. 144 30
D'oench, Duhme Co. v. Federal Deposit Insurance Corp., 315 U. S. 447 28
Dowell v. Cox, 108 Va. 460 27

Eastern Air Lines, Inc. v. Union Trust Co., 95 U. S. App. D. C. 189, 221 F. 2d 62, certiorari denied *sub nom.* Union Trust Co. v. United States, 350 U. S. 911 ..... 19, 23, 26
Erie R. Co. v. Tompkins, 304 U. S. 64 28

Fenton v. Sinclair Refining Co., 206 Okla. 19 31
Feres v. United States, 340 U. S. 135 ..... 15, 21, 32
Flora v. United States, 357 U. S. 63 12
F. W. Woolworth Co. v. Todd, 204 Okla. 532 30

Gochenour v. St. Louis-San Francisco Ry. Co., 205 Okla. 594 ..... 20, 25, 30, 31

PAGE

Hess v. United States, 259 F. 2d 285 (9th Cir.), reversed on other grounds, 361 U. S. 314 ..... 23, 27, 28

Iselin v. United States, 270 U. S. 245 24

Jackson v. Taylor, 353 U. S. 569 26

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487 28

Lauritzen v. Larsen, 345 U. S. 571 26
Lee Way Motor Freight v. Yellow Transit Freight Lines, 251 F. 2d 97 (10th Cir.) 30
Levy v. Daniel's U-Drive Auto Renting Co., 108 Conn. 333 25

Massachusetts Bonding & Insurance Co. v. United States, 352 U. S. 128 ..... 21, 26, 30
McKenzie v. Irving Trust Co., 323 U. S. 365 ..... 21, 28

National Labor Relations Board v. Lion Oil Co., 352 U. S. 282 14
Nolan v. Transocean Airlines, 276 F. 2d 280 (2d Cir.), judgment set aside and remanded, 365 U. S. 293, reaffirmed on remand, 290 F. 2d 904 22

Osaka Shosen Kaisha Line v. United States, 300 U. S. 98 12-13

Panama Refining Co. v. Ryan, 293 U. S. 388 14

Richards v. United States, 285 F. 2d 524 (10th Cir.) .. 14, 23, 24, 33

Sherly v. Lotz, 200 Va. 173 32
Slater v. Mexican National R. Co., 194 U. S. 120 26
Soriano v. United States, 352 U. S. 270 21

PAGE

State of Maryland for use of Burkhardt v. United States, 165 F. 2d 869 (4th Cir.) 21, 29
State of Maryland for use of Jones v. Coard, 175 Va. 571 ..... 27, 32

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U. S. 448 ..... 24, 29

Union Trust Co. v. Eastern Air Lines, 350 U. S. 907, modified and remanded, 350 U. S. 962 27
Union Trust Co. v. United States, 113 F. Supp. 80 (D. C. Dist. of Col. 1953) 27
United States v. Hartwell, 6 Wall. 385 13
United States v. Marshall, 230 F. 2d 183 (9th Cir.) ..23, 27, 28
United States v. Shirley, 359 U. S. 255 26
United States v. Spelar, 338 U. S. 217 ..... 17, 19
United States v. Union Trust Co., 95 U. S. App. D. C. 189, 221 F. 2d 62, certiorari denied 350 U. S. 911 31
United States v. Wiltberger, 5 Wheat. 76 13

Van Camp & Sons v. Am. Can Co., 278 U. S. 245 13
Vanston Bondholders Protective Committee v. Green, 329 U. S. 159 28
Voytas v. United States, 256 F. 2d 786 (7th Cir.) 23, 27
Vrooman v. Beech Aircraft Corp., 183 F. 2d 479 (10th Cir.) 25

Wells v. Simonds Abrasive Co., 345 U. S. 514 30
Withrow v. Edwards, 181 Va. 344, reversed in part on other grounds, 181 Va. 592, cert. den. 320 U. S. 761 32

PAGE

STATUTES

Federal Tort Claims Act, 28 U. S. C. (1952 Ed.):

Section 1346(b) 2, 6, 12, 14, 15, 16, 20, 23, 25, 28, 30
Section 1402(b) 2, 6, 10, 15, 28
Section 2401(b) 20
Section 2402 20
Section 2671 6
Section 2672 ..... 2-3, 14, 15, 25
Section 2674 ..... 3, 14, 15, 20, 23, 25
Section 2675(a) 15
Section 2676 15
Section 2680 ..... 6, 20
Section 2680(a) 15
Section 2680(e) 15
Section 2680(h) 20
Section 2680(k) 20, 22

Legislative Reorganization Act, Title IV (1946), 60 Stat. 842 ..... 15, 17

Missouri Wrongful Death Statute, Title 36, V. A. Mo. S. Ch. 537, §537.080 (R. S. 1939, Sec. 3653) 4

Oklahoma Wrongful Death Statute, Title 12, Okl. St. Ann., §1053 (1937 Ed., as amended Laws 1943, p. 35, §1) 3-4, 6

R. S. 1939, §3653 4

Statutes at Large:

60 Stat. 842 ..... 15, 17
62 Stat. 983 ..... 3, 14

United States Code, Title 28, §1254(1) 1

PAGE

AUTHORITIES

15 C. J. S. *Conflict of Laws*, §12, nn. 63, 70, 71 25
25 C. J. S. *Death*, §28, nn. 27-30 25
Goodrich, *Conflict of Laws*, 263-264 (1949 ed.) 25
Restatement, *Conflict of Laws* (1934), §§377, 378, 391 ..20, 25
Rheinstein, "*The Place of Wrong*," 19 Tulane L. Rev. 4, 165 26

MISCELLANEOUS

Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, January 29, 1942, pp. 1-69 .....15, 16, 17, 18, 19, 20-21
Pages 1-6: Committee Print of H. R. 5373 ....16, 17, 18
Pages 6-24, 30-36: Oral testimony before Committee 16, 17, 18, 19, 20-21
Pages 24-30: Prepared statement of draftsmen ..16, 18, 19
Pages 37-46: Memorandum, with Appendices, for use of the Committee on the Judiciary—Explanatory of Committee Print of H. R. 5373 ..15, 16, 17
Pages 47, 48: Appendix I to Memorandum 16
Pages 49-55: Appendix II to Memorandum 16
Page 56: Appendix III to Memorandum 16
Pages 57-69: Appendix IV to Memorandum 16, 18

H. R. 5299, 77th Cong., 1st Sess. 16
H. R. 5373, 77th Cong., 1st Sess. 16, 17, 18, 19
Section 201 16
Section 303(12) 18

PAGE

H. R. 6463, 77th Cong., 2d Sess. 16
Section 201 17
Section 301 ..... 17, 19
Section 402(12) 18
H. R. 6716, 69th Cong., 1st Sess. 16
H. R. 7236, 76th Cong., 3d Sess. 16, 17, 18
H. R. 8651, 69th Cong., 1st Sess. 16
H. R. 9285, 70th Cong., 2d Sess. 16
H. R. Rep. No. 1287, 79th Cong., 1st Sess. 18
H. R. Rep. No. 2245, 77th Cong., 2d Sess. 18
S. 211, 72d Cong., 1st Sess. 16
S. 1043, 74th Cong., 1st Sess. 16
S. 2690, 76th Cong., 1st Sess. 16
S. Rep. No. 1196, 77th Cong., 2d Sess., §301 18
S. Rep. No. 1400, 79th Cong., 2d Sess. 18

IN THE

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OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., *et al.*,

Petitioners,

—against—

UNITED STATES *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the Court of Appeals is reported in 285 F. 2d 521. No opinion was written by the District Court. The judgment of the District Court, applicable to all actions, was entered and filed January 18, 1960, and was based upon Findings of Fact, Conclusions of Law and Order of Judgment made by the Court (R. 20-22).

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

was filed February 21, 1961. Certiorari was granted by this Court May 8, 1961, 366 U. S. 916.

Statutes Involved

Title 28 U. S. C. §1346(b) (1952 Ed.) provides as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant, in accordance with the law of the place where the act or omission occurred.

Title 28 U. S. C. §1402(b) (1952 Ed.) provides as follows:

> Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. June 25, 1948, c. 646, 62 Stat. 937.

Title 28 U. S. C. §2672 (1952 Ed.) provided on August 4, 1955, in pertinent part, as follows:

> The head of each federal agency, or his designee for the purpose, acting on behalf of the United States,

may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28 U. S. C. §2674 (1952 Ed.) provides as follows:

LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries, resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. (June 25, 1945, c. 646, §1, 62 Stat. 983.)

Title 12 Okl. St. Ann. §1053 (1937 Ed., as amended Laws 1943, p. 35, §1):

When the death of one is caused by the wrongful act or omission of another, the personal representative

of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased. As amended Laws 1943, p. 35, §1.

Title 36 V. A. Mo. S. Ch. 537, §537.080, provided on August 4, 1955, as follows:

LIABILITY FOR WRONGFUL DEATH GENERALLY

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. (R. S. 1939, §3653.)

QUESTIONS PRESENTED

Question 1

Do the provisions of the Federal Tort Claims Act, that the liability of the United States shall be determined in accordance with the law of the place where the negligent act or omission occurred, require the Federal District Court sitting in Oklahoma to apply the Oklahoma Wrongful Death Statute to petitioners' wrongful death claims against the United States of America, where the deaths of decedents within the State of Missouri were alleged to be caused by the negligent acts and omissions of the Government's employees within the State of Oklahoma?

Question 2

Although the liability of a private person in a wrongful death action brought against him in the Courts of Oklahoma, to recover damages for a wrongful death which occurred in Missouri as a result of his alleged negligent acts and omissions occurring in Oklahoma, would be determined by the law of Missouri because (1) the Oklahoma conflict of laws rule would require such reference, and (2) the Oklahoma Wrongful Death Statute has no extraterritorial application to a death which occurs in Missouri, should not the Court below have been required by the provisions of the Federal Tort Claims Act to apply the Oklahoma Wrongful Death Statute, under the same circumstances, to determine the liability of the United States of America in actions commenced against it pursuant to the provisions of the Tort Claims Act?

Statement of the Case

All of the within actions were commenced by petitioners against the United States of America in the Northern District of Oklahoma pursuant to the provisions of the Federal Tort Claims Act, 28 U. S. C. §§1346(b), 1402(b), 2671-2680, to recover damages for the wrongful deaths of their respective decedents (R. 1-8).[1] Jurisdiction of the District Court in all actions was based upon 28 U. S. C. §1346(b) (R. 5). Petitioners' decedents were killed on August 4, 1955 near Fort Leonard Wood, Missouri, in the crash of an airplane owned and operated by American Airlines, Inc. (R. 5, 7). Petitioners sought to recover damages under the Oklahoma Wrongful Death Statute, Title 12 Okl. Stat. Ann. §§1051-1054 (R. 5). No claim was made in any of these actions which sought relief under the laws of Missouri. Subsequent to the commencement of the actions, the United States impleaded American Airlines, Inc. as a third party defendant (R. 11).

At pre-trial conferences the District Court concluded that petitioners had no actionable claims against the United States of America under either the law of Oklahoma or the law of Missouri (R. 24-26, 35-37). The Court's conclusion was based upon the determination that (1) there is no cause of action under the Oklahoma Wrongful Death Statute where an act or omission occurring in Oklahoma results in injury and death in Missouri, and (2) if Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including its conflict of laws rule,

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[1] The pleadings in each of the within actions are identical insofar as the issues presented on this appeal are concerned. Therefore, the Court's decision based upon the pleadings in the *Richards* case will be determinative of all the issues presented in all the actions herein (see R. 20).

is applicable thereunder. The Court further concluded that in the circumstances of these cases the Oklahoma conflicts of law rule requires that petitioners' claims be determinable by reference to the Missouri Wrongful Death Statute and since petitioners had already received full satisfaction for any claims they might have had under that Statute,[2] they had no further claims thereunder (R. 21-22). In accordance with its Fndings of Fact and Conclusions of Law, the District Court entered its Order of Judgment dismissing the complaints in all fourteen actions with prejudice (R. 20-22).

Upon appeal to the Court of Appeals, the petitioners herein argued that the District Court was in error in the following respects: (1) The District Court's conclusions of law completely negated the ordinary meaning of the language actually employed by Congress to designate the law to be applied in determining the tort liability of the Government. If Congress had intended to measure the Government's liability in accordance with the law of the place of the death, tort, wrong or injury, it could easily have said so. Since it did not, it can be presumed that Congress intended that the explicit language used in the Act be given its natural meaning; (2) It can be presumed that when Congress stated in the Act that the government was to be liable "in accordance with the law of the place where the act or omission occurred" it was fully aware that the general conflict of laws rule prevailing in most states would refer the determination of a private defendant's liability for wrongful death to the law of the state in which the injury causing the death occurred. Therefore, by applying the general conflict of laws rule followed in Oklahoma in a non-diversity action against the United States of America, the District Court defeated the Congressional mandate that the liability of the Govern-

[2] See Petition, p. 5, nn. 1 and 2.

ment should be determined in accordance with the law of the state where the negligent act or omission occurred; (3) In providing claimants with a judicial remedy against the Government for the latter's torts, Congress was competent to impose any condition on that remedy it desired, including its own choice of law rule to determine the Government's liability. With regard to wrongful death actions commenced against private defendants, the choice of law rule specified by Congress in the Tort Claims Act does not change, in any manner, the established law of the states pertaining to the conflict of laws rules or the extraterritorial application of the states' wrongful death statutes. This is because the choice of law set forth by Congress in the Tort Claims Act can only be applied in nondiversity actions by the federal courts wherein the United States of America is the defendant.

In affirming the judgment of the District Court, the majority of the Court of Appeals stated that if the Tort Claims Act were silent with respect to the law to be applied in such actions under the Act, it would be clear that the general conflict of laws rule would apply (R. 41). However, the majority did expressly recognize that the Act was not silent in this area and it agreed that Congress took effective action to make a different rule applicable to the Government in such actions under the Tort Claims Act, *viz.*, that in a case in which the act or omission occurs in one state and the resulting death in another, the Act subjects the Government to liability in accordance with the tests and standards of the substantive law of the state in which the act or omission occurred (R. 42). Nevertheless, the majority was persuaded that its own view found adequate support in the Act (R. 42). The Court then determined that the Oklahoma Wrongful Death Statute had no extraterritorial effect in that the statute did not create a cause of action for a wrongful death occurring

in another state; it could not be applied to actions brought in the courts of Oklahoma for wrongful death occurring outside the state; and its application was limited to wrongful deaths which occur in Oklahoma (R. 43). The majority further determined that even though an action to recover for a wrongful death occurring in another state may be properly maintained in the courts of Oklahoma, such an action is not one to recover under the Oklahoma Wrongful Death Statute, but one for the enforcement of a right of action having its source in the law of the state in which the wrongful death occurred (R. 43). After discussing the Missouri Wrongful Death Statute and its limitations on the amount of recoverable damages, the majority then concluded by stating, "And this court is committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered" (R. 44). Since petitioners received full satisfaction under the law in which the deaths occurred, i.e., Missouri, the judgments of dismissal were severally affirmed (R. 45).

The dissenting opinion of Chief Judge Murrah stated that any right to recover under the Tort Claims Act would be inapplicable in all cases where the act or omission occurs in one state and the resulting death in another, if such right were made to depend upon the extraterritorial effect of the wrongful death statute of the place of the negligent act, since few, if any, state wrongful death statutes have any extraterritorial effect (R. 45). That by resorting to the Oklahoma conflict of laws rule, the majority not only acted contrary to the Court's agreed interpretation of the Tort Claims Act, but also raised a possible *renvoi* problem, e.g., if these suits had been commenced in

the District Court in Missouri,[3] the Missouri court, in accordance with the provisions of the Tort Claims Act, would have looked to the law of Oklahoma as the place where the negligent act occurred. Since the Oklahoma conflict of laws rule would apply the law of Missouri as the place where the death occurred, the Missouri court would then be faced with a referral back to its own law which, under the Tort Claims Act, would again refer to the law of Oklahoma as the place where the act or omission occurred (R. 45, 46). Judge Murrah concluded that Congress intended to avoid this circuitous stacking of conflicts rules by providing its own conflicts rule in the Tort Claims Act, that is, by looking to the law of the place of the negligent act and no further. If Congress had intended otherwise, it would have omitted from the Act the phrase, "in accordance with the law of the place where the act or omission occurred." However, by including this language, Congress prescribed the law and conditions under which the Government would become liable (R. 46).

Summary of Argument

I. The Court below should have given the language used by Congress in the Tort Claims Act the meaning which Congress clearly intended by applying the Oklahoma Wrongful Death Statute to petitioners' claims. The words "in accordance with the law of the place where the act or omission occurred" are clear and should have been literally applied since the Act as a whole and its relevant legislative history clearly support such application. The

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[3] In accordance with 28 U. S. C. §1402(b) governing the venue of actions under the Tort Claims Act, petitioners Richards and Maupin, being residents of Missouri, could have properly commenced their actions in the U. S. District Court for the Western District of Missouri.

Court below erred in substituting its own view of the applicable law in place of the clear and unambiguous mandate of Congress on this point. Notwithstanding its express recognition that Congress made a different rule applicable to the United States in such cases, it completely disregarded this rule and applied State rules applicable only in actions between private persons.

II. The Court below erred in applying the State conflict of laws rule to actions governed by the provisions of the Federal Tort Claims Act. In so doing it defeated the congressional purpose to have the Government's liability determined in accordance with the law of the place "where the act or omission occurred."

III. The choice of law provided for in the federal statute herein was rendered meaningless by the application of the State rule governing extraterritorial application of its wrongful death statute, since few, if any, States give extraterritorial effect to their wrongful death statutes. In such cases, therefore, the congressional purpose to have the United States' liability determined in accordance with the law of the place where its employees were negligent would be defeated since such law would never be applied where the resulting death occurs in another state. The Court below, therefore, was in error by following the non-extraterritorial rule as would be applied by the Oklahoma courts in such actions between private parties.

ARGUMENT

I

The holding of the Court below completely negated the ordinary and plain meaning of the language employed by Congress to determine the liability of the United States under the Federal Tort Claims Act.

The Federal Tort Claims Act provides, 28 U. S. C. §1346 (b), that subject to the provisions of the Act:

> "... the district courts . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for ... personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government ... under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*" (Emphasis added.)

This language is unequivocal. This statute says that the law to be applied is the law of the place "where the act or omission occurred." It does not say anything else. By the use of this language, Congress gave the courts affirmative guidance for defining the law to be applied in determining the Government's tort liability. "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of the words employed," *Flora* v. *United States*, 357 U. S. 63, 65. There is no better or more authoritative guide to that meaning than the language of the statute itself, "if the language be clear, it is conclusive." *Osaka Shosen Kaisha Line* v.

United States, 300 U. S. 98, 101; *United States* v. *Hartwell*, 6 Wall. 385, 396.

Over a century ago Chief Justice Marshall, in *United States* v. *Wiltberger* (U. S.), 5 Wheat. 76, 96, stated:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so."

See also, *Van Camp & Sons* v. *Am. Can Co.*, 278 U. S. 245, 253 ("The words being clear, they are decisive. There is nothing to construe."); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 35 ("The language of [the statute] should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress.").

It is difficult to conceive of any more explicit or more precise language which could possibly have been used by Congress to command application of the law of the place of the negligent conduct than the words which it did employ. If Congress had not intended to measure the Government's liability by reference to the law of the place where the act or omission occurred, but instead had desired to measure such liability by the law of the place of the tort, or of the wrong, or of the injury or death, it could easily have said so. It could have said that the Government shall be liable "in accordance with the law of the place where the cause of action arose" or "in accordance

with applicable State law." Or, as suggested in the dissent[*] below of Chief Judge Murrah, Congress could have simply ended the relevant sentence of §1346(b), *supra*, by placing a period after the words "would be liable to the claimant" without adding the additional clause "in accordance with the law of the place where the act or omission occurred." However, Congress chose not to do so. Instead, it directed application of the law where the act or omission occurred, thereby waiving Governmental immunity but prescribing the law and the conditions under which it would become liable.

It is of course fundamental that the meaning of a statute is to be looked for not in a single sentence or section, but in all the provisions together and in their relation to the end in view, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433, 439 (Cardozo, *J.*, dissenting); *National Labor Relations Board* v. *Lion Oil Company*, 352 U. S. 282, 288. An examination of the Federal Tort Claims Act clearly shows that Congress did not confine the place of conduct language merely to §1346(b). 28 U. S. C. §2672 (1952 Ed.) uses identical language in authorizing the head of each Federal agency to make administrative adjustments of claims of $1,000 or less. 28 U. S. C. §2674, which states that the Government shall be liable to the same extent as a private individual in like circumstances, provides in a paragraph added in 1948, 62 Stat. 983, that if "in any case wherein the death was caused, *the law of the place where the act or omission complained of occurred* provides, . . . for damages only punitive in nature, the United States shall be liable for actual or compensatory damages . . ." The use of these italicized words, in an amendment made by Congress almost two years after the Tort Claims Act was enacted, clearly demonstrates congressional approval of the same language it previously used in sections 1346(b)

[*] 285 F. 2d 521, at 526.

and 2672. In addition to sections 1346(b), 2672 and 2674 of the Act, the phrase "act or omission" appears in numerous other sections of the Tort Claims Act. See 28 U. S. C. §§1402(b),[5] 2675(a), 2676, 2680(a) and 2680(e).

This deliberate and consistent use of the same language throughout the Act can be squared only with the conclusion that Congress meant exactly what it said when it directed that the liability of the Government should be measured by the law of the place where the negligent act or omission of its employee occurred.

If the words of the statute itself were not enough to sustain petitioners' contention, the relevant legislative history of the Act clearly reinforces their interpretation of the provisions in question. The Federal Tort Claims Act was passed by the Seventy-ninth Congress in 1946 as Title IV of the Legislative Reorganization Act, 60 Stat. 842, after nearly thirty years of congressional consideration. The primary purpose of the Act was to relieve Congress of the crushing burden of considering thousands of private bills for relief from tort, and to extend a judicial remedy to claimants who, because of the doctrine of sovereign immunity, had no access to the courts.[6] Most of the earlier tort claim bills introduced proposed systems

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[5] It is noteworthy that, if the phrase "act or omission" means the place of the injury rather than the place where the negligent act or omission occurred, it was error for the District Court to entertain the actions brought by anyone except residents of the Northern District of Oklahoma. Only petitioner Gates resides in this District. See 28 U. S. C. §1402(b).

[6] For a detailed legislative history of the Act see, *Dalhite* v. *United States*, 346 U. S. 15, 24-30; *Feres* v. *United States*, 340 U. S. 135, 140. See also, Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess. on H. R. 5373 and H. R. 6463 (*Memorandum, with Appendices, for the use of the Committee on the Judiciary*, 77th *Cong.*, 2d *Sess.—Explanatory of Committee Print of H. R.* 5373), pp. 37-42.

of compensation for personal injury or death to be administered by the United States Employees Compensation Commission,[7] but they did not contemplate making the liability of the United States equivalent to that of a private person. Later tort claim bills[8] proposed vesting concurrent jurisdiction in the Court of Claims and the District Courts to determine claims for injury or death caused by the negligent or wrongful act or omission of Government employees. These later bills provided that "In respect to such claims the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances . . ."[9] However, none of these bills contained the significant language presently in §1346(b), *viz.*, "in accordance with the law of the place where the act or omission occurred."

The last hearings on the Act were held during the second session of the Seventy-seventh Congress.[10] It was during

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[7] *E.g.*, see H. R. 6716 and 8651, 69th Cong., 1st Sess.; H. R. 9285, 70th Cong., 2d Sess.; S. 211, 72d Cong., 1st Sess.; S. 1043, 74th Cong., 1st Sess.

[8] *E.g.*, see H. R. 7236, 76th Cong., 1st Sess.; S. 2690, 76th Cong., 1st Sess.; H. R. 5299 and 5373, 77th Cong., 1st Sess.

[9] *E.g.*, see H. R. 5373, 77th Cong., 1st Sess., Sec. 201.

[10] Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, January 29, 1942, pp. 1-69. These Hearings contain: (a) The Committee print of H. R. 5373 showing changes proposed by H. R. 6463, pp. 1-6; (b) The oral testimony of the then Assistant Attorney General Francis M. Shea in support of the bill, pp. 6-24, 30-36; (c) A prepared statement and discussion of the draftsmen comparing H. R. 5373 and H. R. 6463, pp. 24-30; (d) A Memorandum, with Appendices, for the use of the Committee on the Judiciary, for the purpose of explaining H. R. 6463, the Committee Print of H. R. 5373, pp. 37-46. Annexed to the Memorandum are: Appendix I: List of statutes to be repealed by H. R. 6463, pp. 47, 48; Appendix II: Criticisms by Congressmen of existing procedure of relief by private claims bills, pp. 49-55; Appendix III: Private claims bills before several recent Congresses, p. 56; Appendix IV: Comparison of H. R. 6463 with H. R. 7236, 76th Cong., 3d Sess., and H. R. 5373, 77th Cong., 1st Sess., pp. 57-69.

this Congress that the shape of the Federal Tort Claims Act was largely determined since no further hearings were held or substantial modifications were made prior to its enactment during the Seventy-ninth Congress as Title IV of the Legislative Reorganization Act of 1946.[11] The first time this language appeared was in H. R. 6463, 77th Cong., 2d Sess., §§201, 301, which was the House Judiciary Committee's printed revision of H. R. 5373, the latter being introduced during the first session of the Seventy-seventh Congress.[12]

Mr. Shea, the Assistant Attorney General, in explaining the differences between H. R. 5373 and the Committee revision, H. R. 6463, stated that there were "some changes which are in my opinion very desirable . . ."[13] The Memorandum submitted to the Committee which explained the Committee's revision stated that H. R. 6463 follows closely to the pattern of H. R. 7236 and H. R. 5373, "with two important exceptions."[14] The Memorandum continued:[15]

> "The other major difference is that the present bill subjects the determination of the validity of the claim, the defenses thereto, and the distribution of the recovery, *to the law of the place where the delinquent act or omission occurred.* H. R. 7236 and H. R. 5373

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[11] 60 Stat. 842. See, *United States* v. *Spelar*, 338 U. S. 217, 220, n. 9.

[12] Hearings, *supra*, n. 10, pp. 2 and 3, §§201, 301.

[13] Hearings, *supra*, n. 10, p. 7.

[14] Hearings, *supra*, n. 10, p. 42. The first exception referred to was that H. R. 6463 vested exclusive jurisdiction over tort claims in the District Courts. H. R. 5373 and H. R. 7236 gave concurrent jurisdiction over such claims to the Court of Claims and the District Courts.

[15] Hearings, *supra*, n. 10, p. 43.

may, as a matter of law, have embodied the first of these requirements to some extent, but the present bill states this explicitly, and leaves to the local law the determination of certain matters specifically treated in H. R. 7236 and H. R. 5373, such as the beneficiaries entitled to the recovery in death cases, the defense of contributory negligence, and the like." (Emphasis added.)

Numerous other references to such law appear in the testimony and the documents submitted during this Hearing[16] as well as in subsequent bills and reports considered by the Congress prior to the passage of the Act.[17]

It is pertinent to observe also the remarks of the draftsmen concerning another change made in H. R. 6463 by the Committee. H. R. 5373, §303 (12) had excluded from coverage of the bill, "Any claim arising in a foreign country *in behalf of an alien.*" H. R. 6463, §402 (12) deleted the italicized words with this explanation: "Claims arising in a foreign country have been exempted from H. R. 6463, whether or not the claimant is an alien. Since liability is

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[16] Hearings, *supra*, n. 10, pp. 2, 3, 26, 27, 29, 30, 35, and 61.

[17] *E.g.*, see H. R. Rep. No. 2245, 77th Cong., 2d Sess., to accompany S. 2221, §§201, 301, pp. 2, 9; S. Rep. No. 1196, 77th Cong., 2d Sess., to accompany S. 2221, §§201, 301 and discussion of §301, p. 6; H. R. Rep. No. 1287, 79th Cong., 1st Sess., to accompany H. R. 181, §301; S. Rep. No. 1400, 79th Cong., 2d Sess., to accompany 2177, §410, p. 32. That the "local law" means the law of the place where the negligent conduct occurred is indicated in S. Rep. No. 1196, 77th Cong., 2d Sess., §301, in which the Government's liability is determined "in accordance with the law of the place *where the negligence occurred.*" A discussion of this section appearing on page 6 states: "The liability of the United States is to be the same as that of a private individual under like circumstances and is to be determined under *local law* . . . *Local law* will govern not only the matter of liability but also the defenses available and the beneficiaries entitled to recovery." (Emphasis added.)

to be determined by the law of the *situs of the wrongful act or omission*, it is wise to restrict the bill to claims arising in this country." [18] (Emphasis added.) It is noteworthy that the Committee did not use the words "situs of the tort" or "situs of the injury" or "place where the cause of action accrued", but instead used the place of conduct language.[19]

Respondent American Airlines contended in the Court below that if the law of Oklahoma were to govern the Government's liability in these cases, then the United States

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[18] Hearings, *supra*, n. 10, p. 29. Mr. Shea repeated this language during his oral testimony before the Committee, p. 35. See also, *United States* v. *Spelar*, 338 U. S. 217, 221.

[19] On page 9 of these Hearings, *supra*, n. 10, Mr. Shea was questioned by Congressman Robsion concerning the venue provisions under the Act as follows:

> "Mr. Robsion. Where does claimant bring the suit?
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> Mr. Shea. The suit is to be brought in the district courts in the several districts.
>
> Mr. Robsion. Where the claimant resides?
>
> Mr. Shea. Either where the claimant resides, or in the locale of the *injury or damage*." (Emphasis added.)

This is the language which apparently compelled Judge Miller in his partial dissent in *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F. 2d 62, 80 (D. C. Cir. 1955) to conclude that the consequence of the negligent act or omission is to be considered in determining the applicable law. It is doubtful, however, whether Mr. Shea in responding to a question concerning venue, had in mind choice-of-law problems arising out of multi-state torts. This is made clear from a reading of the Hearings as a whole, for this was the only instance in which such language was used. Actually, Mr. Shea's response to this venue question was the exact opposite of the language used in the Committee revision of H. R. 5373. The Committee revision provided in §301 that: ". . . the United States District Court for the district wherein the plaintiff is a resident *or wherein the act or omission complained of occurred* . . shall have exclusive jurisdiction . . ." (Emphasis added), Hearings, etc. p. 2. In view of the numerous references to the place of conduct language, *supra* n. 16, it is submitted that since his remark was not addressed to the choice of law problem, but only to the venue provision, it is apparent that it has no probative significance or any bearing on the question at issue.

would not be liable "in the same manner and to the same extent as a private individual under like circumstances" 28 U. S. C. §2674, since the liability of a private person under the circumstances in these cases would be determined by the law of Missouri, the place where the injury causing the deaths occurred. See Restatement, *Conflict of Laws* (1934), §§377, 378, 391; *Gochenour* v. *St. Louis-San Francisco Ry. Co.*, 205 Okla. 594. The trouble with this argument is that the Act itself clearly dictates that the remedy shall not, in every instance, be coextensive with that available against a private person. Congress has provided procedural and substantive differences in the Act as well as departures from the common law.[20] These differences are noted in the legislative history[21] and judicial

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[20] To illustrate a few of the differences between a claimant's right to relief against the United States under the Act and his right to relief against a private individual under like circumstances: The Act permits claimants to sue only in the federal courts, and not in the state courts which are available in actions against a private individual, §1346(b); the Act prescribes its own period of limitations which may be shorter or longer than that of the state, §2401(b); the claimant cannot obtain a trial by jury under the Act, although he could against a private individual, §2402; the claimant cannot obtain interest prior to judgment in suits under the Act regardless of the state rule governing private individuals, §2674; the claimant cannot obtain punitive damages under the Act, even though state law may provide for it as against a private defendant, §2674; the claimant cannot recover any damages against the United States on any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, whereas he could recover such damages against a private individual, §2680(h); the claimant cannot obtain any recovery against the United States on a claim arising in a foreign country, although he could against a private individual, §2680(k); and the Act exempts the Government from liability for claims based on various types of activities, although a private individual would be liable in the same circumstances, §2680.

[21] Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, p. 31, wherein it is stated:

[*Continued on next page*]

decisions construing the Act." It is thus clear that Congress, in waiving the traditional governmental immunity, clearly intended to place limits upon its waiver for the purpose of protecting the Government. Cf. *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365, 369.

These restrictions and conditions upon the remedy conferred by the Act, evidencing wide variances from the relief obtainable against a private individual in similar circumstances, simply illustrate the settled principle that in consenting to suit against the Government, Congress can impose any condition it chooses upon the right to sue and upon the nature of the remedy, *Soriano* v. *United States*, 352 U. S. 270, 276-277; *Dalehite* v. *United States*, 346 U. S. 15, 31. The Tort Claims Act's requirement of the application of the law of the place where the negligent act or omission occurred, rather than the application of the law of the place of the injury or of the act's consequences, is but another variance which Congress chose to insert.

Adherence to the literal mandate and natural meaning of the "act or omission" clause does not result in any conflict with the basic purpose or policy of the Act. For it seems clear that Congress, knowing that the negligent acts or omissions of governmental employees could have

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"Mr. McLaughlin. The United States, as I understand it, is placed in the same position as an individual?

Mr. Shea. With the exceptions noted.

Mr. McLaughlin. With the exception that no costs may be assessed against the United States?

Mr. Shea. That is right. There are some additional exceptions."

[11] *State of Maryland, to use of Burkhardt* v. *United States*, 165 F. 2d 869 (4th Cir. 1947); *Massachusetts Bonding & Insurance Co.* v. *United States*, 352 U. S. 128; *Feres* v. *United States*, 340 U. S. 135; *Dalehite* v. *United States*, 346 U. S. 15.

disastrous consequences in foreign countries,[23] did not mean to waive sovereign immunity to the extent that the liability of the United States would be determined in accordance with the law of a foreign power. See 28 U. S. C. §2680(k). The "act or omission" language further exemplifies this policy. The "act or omission" language also has the sensible benefit of adopting the law of the state (a) in which the government's employee is located and controlled by his superiors, (b) which determines the applicable standard of care governing such employee, (c) which can provide the Government with knowledge of defenses which will be available to it before it proceeds upon a course of action, and (d) which results in greater simplicity and certainty.[24] In such circumstances there is no warrant for departing from the rule expressly prescribed by Congress.

This, however, is exactly what the majority of the Court below did, notwithstanding that it recognized that Congress "for reasons of its own choice" took effective action to make a different rule applicable to the Government in such cases. The Court below stated that there would be no doubt that Missouri law would determine the Government's liability in these cases *if* the Tort Claims Act were silent.

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[23] It is noteworthy that in the case of *Dalehite* v. *United States*, 346 U. S. 15, had the French ship "Grandcamp" exploded at the French port of its destination instead of in Texas City, Texas, the question of the Government's liability to those injured and killed in France would have been determined, in all probability, in accordance with the law of France, in the absence of the exception contained in 28 U. S. C. §2680(k). The "act or omission" language in the Act is but another example of congressional policy to have the liability of the United States determined in accordance with the law of the place where the Government's employees *act*.

[24] Cf., *Nolan* v. *Transocean Airlines*, 276 F. 2d 280 (2d Cir. 1960), judgment set aside and remanded, 365 U. S. 293, reaffirmed on remand, 290 F. 2d 904.

It then expressly recognized the fact that the Act was not silent by stating, 285 F. 2d at 524:

> "But the Tort Claims Act is not silent in that area. For reasons of its own choice, *Congress took effective action to make a different rule applicable to the Government in such cases.*" (Emphasis added.)

The Court then summarized the pertinent parts of §§1346(b) and 2674 and stated at page 524:

> "When construed together, the effect of the two provisions in a case in which the act or omission occurs at one place and the resulting death at another is to subject the Government to liability according to the tests and standards of the substantive law of the state in which the act or omission occurred. Except when expressly provided otherwise in the Act itself, the effect of the two provisions in a case in which the act or omission occurs at one place and the resulting death at another is to equate the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred. Eastern Air Lines v. Union Trust Co., [95 U. S. App. D. C. 189, 221 F. 2d 62, certiorari denied Union Trust Co. v. U. S., 350 U. S. 911]; Voytas v. United States, 7 Cir., 256 F. 2d 786."

Recognizing the contrary view expressed in *United States* v. *Marshall*, 9 Cir., 230 F. 2d 183, and *Hess* v. *United States*, 9 Cir., 259 F. 2d 285, the Court continued by stating "But we are persuaded that our view finds adequate support in the Act." 285 F. 2d at 524. However, the majority opinion of the Court makes no further reference to the Act or any of its legislative history. It merely discusses

the Oklahoma Wrongful Death Act and the fact that the Courts of Oklahoma have held that it has no extraterritorial application to a death occurring in another state and that in actions commenced in the Oklahoma courts to recover damages for a wrongful death occurring in another state the Oklahoma courts will apply its conflict of laws rule and apply the law of the state where the injury causing the death occurred. 285 F. 2d at 524-525. The Court concludes its opinion by stating that it is "committed" to a rule which, after it is stated, reveals itself to be the general conflict of laws rule, and citing in support thereof a case in which the cause of action was between private persons.

The majority of the Court below utterly failed to establish any basis whatsoever in the Tort Claims Act for the views it expressed. After recognizing that Congress made a "different rule" applicable to the Government, the Court was clearly in error in completely disregarding that rule by substituting its own views for those of the legislature. The Court below did not construe this statute to seek the legislative meaning, it merely enlarged the statute so that what it thought was omitted, presumably by inadvertence, it would include. See *Iselin* v. *United States*, 270 U. S. 245, 251. This "disrespects legislative responsibility and disregards judicial limitations." *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 460, 473 (dissenting opinion).

II

The application of the Oklahoma conflict of laws rule by the Court below defeated the legislative purpose to have the liability of the United States determined in accordance with the law of the place where the act or omission occurred.

The rule followed by the Oklahoma courts where the injury causing death occurs in another state is the conflict of laws rule generally followed in most jurisdictions in this country,[25] i.e. the court will apply the law of the state where the injury occurred that caused the death, *Gochenour* v. *St. Louis-San Francisco Ry. Co.*, 205 Okla. 594. Petitioners have no quarrel with this rule *insofar as it is applied in actions between private persons.* However, the Tort Claims Act, as the Court below candidly admitted, makes a different rule applicable to the Government in such cases. The Act provides that the liability of the United States it to be determined in accordance with the law of the place "where the act or omission occurs."[26] The use of this language is entirely inconsistent with a legislative intent to include the general conflicts rule prevailing in most states. And it cannot be realistically inferred that the lawmakers, in making its choice in such clear and unambiguous language, did not have knowledge or take cognizance of that rule, or of the minority rule on this subject.[27] Congress, thus faced with 'wo competing rules,

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[25] Restatement, *Conflict of Laws* (1934) §§377, 378, 391; 25 C. J. S., *Death*, §28, nn. 27-30; 15 C. J. S., *Conflict of Laws*, §12, nn. 63, 70, 71; Goodrich, *Conflict of Laws*, 263-264 (1949).

[26] 28 U. S. C. §§1346(b), 2672, 2674.

[27] *E.g.*, see, *Vrooman* v. *Beech Aircraft Corp.*, 183 F. 2d 479 (10th Cir.); *Levy* v. *Daniel's U-Drive Auto Renting Co.*, 108 Conn. 333; *Baker* v. *Haldeman-Julius*, 149 Kan. 560; *Caldwell* v. *Gore*,

clearly stated that "the law of the place where the act or omission occurred" should control. In making such choice, it should not be for the courts to question the judgment of the Congress in so doing, *Jackson* v. *Taylor*, 353 U. S. 569, 580, for it deliberately chose to permit differences to exist between the law applicable to a private defendant and that applicable to the United States. Cf. *Massachusetts Bonding & Insurance Co.* v. *United States*, 352 U. S. 128.

To say that the law of the place "where the act or omission occurred" includes the conflict rules of the state would result in, as pointed out in the dissent below, a circuitous stacking of one conflicts rule on another in order to arrive at controlling substantive law. Surely it cannot be inferred that Congress expressed itself in self-defeating terms, *United States* v. *Shirley*, 359 U. S. 255, 260. Yet this would be the result if the decision below is to stand.

In *Eastern Air Lines, Inc.* v. *Union Trust Company*, 221 F. 2d 62 (D. C. Cir. 1955) certiorari denied *sub nom. Union Trust Co.* v. *United States*, 350 U. S. 911, the exact question herein presented was before the District of Columbia Court of Appeals. That case involved a collision between a P-38 airplane with DC-4 airliner over the District of Columbia resulting in the deaths of everyone aboard the airliner. Plaintiff sued Eastern Air Lines and the United States and obtained a jury verdict against the airline in the amount of $50,000 under the law of the District of Columbia. The trial judge held the Government liable in the Tort Claims Act case and fixed damages in the same amount, $50,000. The Court of Appeals reversed the Dis-

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175 La. 501; *Burkett* v. *Globe Indemnity Co.*, 182 Miss. 423; cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Slater* v. *Mexican National R. Co.*, 194 U. S. 120; *Lauritzen* v. *Larsen*, 345 U. S. 571. See also, Rheinstein, *"The Place of Wrong"* 19 Tulane L. Rev. 4, 165.

trict Court's decision that the airline was liable. Upon the petition of the plaintiff, this granted certiorari and reversed the judgment of the Court of Appeals in the case against the airline, *Union Trust Co.* v. *Eastern Air Lines*, 350 U. S. 907, later reopened, modified and remanded, 350 U. S. 962. In the case against the Government the Court of Appeals affirmed the holding of the District Court but reduced the damages to $15,000 because the negligent acts and omissions of the Government employees occurred in the control tower in Virginia, and under the law of that state $15,000 was the limit which could be recovered under its death statute. Although the trial court made a specific determination that the accident happened in the District of Columbia, *Union Trust Co.* v. *United States*, 113 F. Supp. 80, 85 (D. C., D. C. 1953), and although Virginia courts followed the general conflict of laws rule, *State of Maryland for use of Jones* v. *Coard*, 175 Va. 571; *Dowell* v. *Cox*, 108 Va. 460, the Court of Appeals nevertheless applied the internal law of Virginia and the death statute of that state in determining the Government's liability.[28] See also *Voytas* v. *United States*, 256 F. 2d 786 (7th Cir. 1958). The cases of *United States* v. *Marshall*, 230 F. 2d 183 (9th Cir. 1956) and *Hess* v. *United States*, 259 F. 2d 285 (9th Cir. 1958), *rev'd* on other grounds, 361 U. S. 314, which were relied on by respondent American Airlines in the Court below, are not to the contrary. In the *Marshall*

[28] Respondent American Airlines contended in the Court below and in this Court (Brief in opposition to Petition, pp. 4-6, and Appendix) that the only reason Virginia law was applied in the *Union Trust* case was because of a stipulation to this effect between the attorneys for the parties. This stipulation was not made part of the record before the Court below nor is it made part of the record before this Court. Notwithstanding, this stipulation clearly shows that all the parties agreed to was to be bound by the final *decision* made by the Court in that case. In other words the District of Columbia Courts first had to *decide* this question, which it eventually did.

case the Court found negligence of the Government in Idaho as well as Utah. In the *Hess* case there was no question of applying the substantive law of one state rather than that of another, *Hess* v. *United States*, 361 U. S. 314, 318, n. 7.

Although the Court below did not refer to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, or *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, it seems apparent that the Court erroneously applied the rules of those two cases in arriving at its decision. While the *Erie* case commands application of the substantive law of the state in which the district court sits and *Klaxon* requires the application of the forum state's conflict of laws rule, it is clear that the rules of those cases are limited to actions based upon diversity of citizenship jurisdiction; whether they will be extended to actions in which jurisdiction is based upon a federal statute remains unanswered. See, *D'oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U. S. 447; *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365; *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156. In non-diversity actions under the Tort Claims Act, however, it is §1346(b) which affords the direction to state law, not *Klaxon*. While in diversity cases governed by *Klaxon*, the district court must look to the law of the *forum* for guidance, in actions under the Tort Claims Act the district court is only required to look to the law of the place where the act or omission occurred, and that does not necessarily have to be the law of the state in which the district court sits, 28 U. S. C. §1402(b).[29]

[29] Application of state conflict of laws rules to the "act or omission" language of the Act would also render the option in §1402(b) meaningless. That is, should claimants follow the congressional direction and commence suit in the district in which the act or omission they complain of occurred, or must they follow the precarious course of first determining the states conflict rule before commencing their action? Needless to say the choice would be difficult if the applicable statute of limitations were about to expire.

III

Since the choice of law in these actions is federal and not state, the application of the Oklahoma rule, that its death statute has no extraterritorial effect, was a complete disregard of the congressional purpose to have the liability of the Government determined in accordance with the law of the place where the act or omission occurred.

In holding that the Oklahoma Wrongful Death Statute could not be applied in these actions, the Court below in effect allowed the Courts of Oklahoma to interpret a Federal statute. It should not be disputed that Federal interpretation of the federal law will govern, not state law, *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 456. In enacting federal legislation, Congress should not be bound by decisions of state courts which have the effect of defeating such legislation, particularly where Congress has explicitly expressed itself on the point. In following decisions of the Oklahoma courts to the effect that its death statute cannot be applied in actions wherein the death occurs in another state, the Court below allowed the words used by Congress to be given a meaning completely opposite to the sense in which Congress used them. In so doing, the Court below failed to recognize that Congress could impose any condition it chose on the governmental immunity it waived. *State of Maryland, to use of Burkhardt* v. *U. S.*, 165 F. 2d 869 (4 Cir. 1947).

The Court below has also failed to recognize that Congress, in making its own choice of the law to determine governmental liability, has not changed any of the rules or policies followed by the states in construing their wrongful death statutes. This is because the choice made by Congress can only be applied in federal courts by federal

judges in actions against the Government under the Tort Claims Act, 28 U. S. C. §1346(b); the states are still free to apply their own rules in state court actions between private parties, subject, of course to applicable constitutional restrictions, *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 516. There are no conflicts of state and federal jurisdiction in such multi-state tort claims merely because Congress chose to have governmental liability determined by a law which the states would not apply in determining the liability of a private defendant. The two rules may subsist without conflict, each reigning in its own realm, *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 155. As long as the choice made by Congress does not disturb the established rules and policies applied by the courts of Oklahoma in actions between private persons, and it does not, it is of no concern to the State of Oklahoma that Congress chose a different rule to be applied only against the United States in federal courts, for Congress has done so in the past when it disagreed with the rule applied by the state. See *Massachusetts Bonding & Insurance Co.* v. *United States*, 352 U. S. 128.

In the Court below the respondent United States agreed that the law of Oklahoma was applicable under the Tort Claims Act since petitioners alleged that the Government's negligence occurred in the State. However, it further contended that since it was well settled in Oklahoma that there was no common law remedy for wrongful death[20] any right to recovery must arise out of the Oklahoma Wrongful Death Statute.[21] It then reasoned that since

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[20] *Lee Way Motor Freight* v. *Yellow Transit Freight Lines*, 251 F. 2d 97, 99 (10th Cir.); *F. W. Woolworth* v. *Todd*, 204 Okla. 532, 534.

[21] *Lee Way Motor Freight* v. *Yellow Transit Freight Lines, supra; Gochenour* v. *St. Louis-San Francisco Ry. Co.*, 205 Okla. 594.

the Oklahoma statute provides a remedy only if the injury that caused the death occurred in Oklahoma, *Gochenour* v. *St. Louis-San Francisco Ry. Co.*, 205 Okla. 594; *Fenton* v. *Sinclair Refining Co.*, 206 Okla. 19, and since the injury causing deaths to petitioners' decedents did not occur in Oklahoma, the petitioners therefore were without a remedy since Oklahoma provided none under the circumstances of these cases. This reasoning of course is but an attempt to avoid the consequences of the argument it successfully urged upon the court in *United States* v. *Union Trust Co.*, 221 F. 2d 62 (D. C. Cir. 1955) *cert. den.* 350 U. S. 911, wherein the Court of Appeals reduced a judgment against the United States of $50,000 to $15,000 to comply with the statutory limitation on wrongful death damages recoverable under the law of Virginia, the place where the Government's negligence occurred.

The reasoning of the United States, that petitioners have no remedy under the Oklahoma statute, must fail for two reasons. First, because this precise point was decided in the *Union Trust Co.* case, *supra*, contrary to the position the Government now takes. In that case the trial court made a specific finding that the accident occurred in the District of Columbia. The jury verdict of $50,000 against Eastern Air Lines could only have been sustained, as it eventually was, upon the ground that the injury causing death occurred in the District of Columbia. For if the injury causing death occurred in Virginia then Eastern would have also been entitled to have the jury verdict reduced to conform to the Virginia statutory limitation of $15,000. However, although the accident occurred in the District of Columbia and the District of Columbian death statute was applied in the action against Eastern Air Lines, the Court of Appeals nevertheless applied the Virginia death statute in the case against the Government,

even though the courts of Virginia have held that its wrongful death statute has no extraterritorial effect, *Sherly* v. *Lotz*, 200 Va. 173; *Withrow* v. *Edwards*, 181 Va. 344, reversed in part on other grounds, 181 Va. 592, certiorari denied, 320 U. S. 761. See also, *State of Maryland for use of Jones* v. *Coard*, 175 Va. 571. The Court of Appeals in the *Union Trust Co.* case merely recognized, as it must have, that the federal choice of law was to be applied in actions against the United States under the Tort Claims Act.

Secondly, the Government is under the misconception that the remedy given to petitioners was given to them by the State of Oklahoma. Clearly this is not so. Prior to the enactment of the Tort Claims Act, persons injured by reason of the negligence of governmental employees could not bring an action in tort against the United States for the simple reason that the Government had not waived its sovereign immunity in such cases. While such persons may have had a "right" they certainly had no remedy. Certainly the laws of Oklahoma did not, and indeed, could not, provide any remedy to such persons enforceable against the United States. Whatever remedy such persons had was in the nature of the non-judicial relief afforded by the use of private bills introduced in Congress. A judicial remedy was first given to such persons when Congress waived the sovereign immunity of the United States by passing the Federal Tort Claims Act in 1946. Then, and only then, did plaintiffs have a judicial remedy, and it was provided by the United States, not Oklahoma. While Congress did not create a new cause of action, *Dalehite* v. *United States*, 346 U. S. 15, 43, it did however provide claimants with a remedy which they did not have before, *Feres* v. *United States*, 340 U. S. 135, 140.

Therefore, as far as suits under the Tort Claims Act are concerned, it does not matter in the least that, under the circumstances in the within actions, Oklahoma would not provide a remedy to a person possessing a claim against a private defendant, for the Tort Claims Act applies to the United States, not private defendants. Thus, in providing that remedy Congress could place any condition upon it that it pleased. One of those conditions, for reasons previously shown, was that the Government's liability was to be determined "in accordance with the law of the place where the act or omission occurred." The dissenting opinion of Chief Judge Murrah clearly showed the effect of the majority's application of the Oklahoma non-extraterritorial rule when he stated, 285 F. 2d at 526:

> "We know that few, if any, state wrongful death statutes have any extraterritorial effect. If, therefore, the right to recover under the Tort Claims Act in cases like these is made to depend upon the extraterritorial effect of the wrongful death statute of the place of the negligent act, the Act would be inapplicable to all such cases. Surely Congress did not intend any such anomalous result."

CONCLUSION

The Court below completely ignored the natural meaning of the words used by Congress in the Federal Tort Claims Act to determine the liability of the United States, even though it specifically agreed that Congress made "a different rule applicable to the Government in such cases." Notwithstanding its agreement, it was persuaded that "our view" found adequate support in the Act. Without identifying such support or even discussing the Act or its legislative history, it held that it was "committed" to a rule of law which is generally applied in state courts in actions between private persons, even though Congress by its words clearly indicated that it intended a different rule to apply. In reaching this result the Court below clearly went beyond its judicial limitations in the face of a clear congressional mandate. It was reversible error for it to do so.

PRAYER

For the foregoing reasons, petitioners pray that the judgment of the Court of Appeals be reversed and that the petitioners be granted such other and further relief as this Court deem proper.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., ET AL.,
Petitioners,

VERSUS

UNITED STATES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES

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SUBJECT INDEX

	PAGE
Statement of the Case	1
Statement of the Issues	2
Summary of Argument	3
Argument	4
I. By the provisions of the Federal Tort Claims Act the liability of the United States is determinable by application of the substantive law of the place wherein the actionable damage, injury, or death occurred	4
Conclusion	13

CITATION OF AUTHORITY

TABLE OF CASES:

Dalehite v. United States, 346 U.S. 15, 24-30	6
Eastern Airlines v. Union Trust Company, 221 F.2d 62 (App. D.C.), Certiorari denied sub nom. Union Trust Company v. United States, 350 U.S. 911	2
Feres v. United States, 340 U.S. 135, 139-140	6
Richards v. United States, 285 F.2d 524 (C.C.A. 10th)	2
United States v. Marshall, 230 F.2d 183 (C.C.A. 9th)	2

INDEX CONTINUED

PAGE

STATUTES:

Federal Tort Claims Act:

28 U.S.C., Sec. 1346(b) 4
28 U.S.C., Sec. 1402(b) 7
28 U.S.C., Sec. 2674 ..... 3, 5

Wrongful Death Act of the State of Oklahoma:

Title 12, Okla. Stat., Sec. 1051, et seq. 12

Wrongful Death Act of the State of Missouri:

Title 36, V.A. Mo. S., Sec. 537.080 4

MISCELLANEOUS:

Hearings before the Committee on the Judiciary, House of Representatives, Seventy-Seventh Congress, Second Session, on H.R. 5373 and H.R. 6463 ..... 6, 7, 9

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BRIEF OF RESPONDENT AMERICAN AIRLINES

STATEMENT OF THE CASE

In each of these actions third-party complaints were filed by respondent United States of America against American Airlines upon asserted rights to full indemnity (R. 11-13). If the allegations of the Government against American be established, then the ultimate payment of any judgment rendered herein must be made by American.[1]

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[1] Respondent American Airlines appears before this Court in support of the judgment rendered favorably to respondent United States of America.

Respondent American adopts the narrative statement of the case as made by petitioners in their brief.

STATEMENT OF THE ISSUES

I.

Negligence of the Government is alleged to have occurred within the State of Oklahoma, resulting in deaths of petitioners' decedents in the State of Missouri. Under these circumstances should the liability of the Government be determinable by application of the law of the state where the deaths occurred,[2] or should the law of the state within which the negligence occurred be applied?[3]

II.

If under these circumstances it be deemed that the liability of the Government is determinable solely by application of the law of the state wherein the negligence occurred, should the Government's liability be determinable by the application of the entire law of that state, including its rule of conflicts of law;[4] or should this liability be determinable solely by reference to the statutory law of that state?[5]

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[2] *United States* v. *Marshall*, 230 F.2d 183 (C.C.A. 9th).

[3] *Eastern Airlines* v. *Union Trust Company*, 221 F.2d 62 (App. D.C.). *Certiorari denied sub nom. Union Trust Company* v. *United States*, 350 U.S. 911.

[4] *Richards* v. *United States*, 285 F.2d 524 (C.C.A. 10th).

[5] This was the result reached in the *Eastern Airlines* case, although no explanation or reason is given for the result *since no majority opinion*

SUMMARY OF ARGUMENT

The *choice of law* indicated by the language of the Federal Tort Claims Act is *the selection of local or state law*, in rejection of a new system of uniform, federal laws. The Act is silent with regard to *a choice of a rule of conflicts of law*, a fact strongly persuasive of a Congressional intent to remove the Government's cloak of immunity to tort claim and suit without modification of existing rules of conflicts of law.

Because the Act expressly provides that the Government shall be liable "in the same manner and to the same extent as a private individual under like circumstances,"[6] existing rules of conflicts of law require, in the circumstances of this case, the characterization of the Government's liability by the substantive law of the state wherein *the actionable negligence* existed.

To extract from the remainder of the provisions of the Act the singular expression "the law of the place

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[5] (Continued)

respecting this issue was filed. Judge Miller dissented, in part stating (at page 80):

> "I do not agree that the language of § 1346(b) *compels us to conclude* that Congress had in mind the general conflicts rule to which reference has been made and intended to make it inapplicable in situations such as this. I think the legislative expression 'in accordance with the law of the place where the act or omission occurred' *was intended to mean, and therefore should be construed as meaning* 'in accordance with the law of the place where the tort occurred.' An act, in legal as well as in popular use, is not merely a voluntary muscular contraction, but something more. The word commonly includes the consequent result of the muscular contraction. If the defendant pulls the trigger and the bullet kills a man, in legal as in popular usage, the killing is said to be the defendant's act." (Emphasis supplied.)

[6] Federal Tort Claims Act, 28 U.S.C., Section 2674.

where the act or omission occurred,"[7] as constituting a Congressional mandate for a drastic, bizarre alteration to existing concepts of conflicts of law, is not justified in the absence of a clear expression of Congressional intent to so provide. No implication of such intention is found in the Congressional hearings. No useful purpose or reason for a different rule exists in favor of the courts, the public, or the Government. Only widespread confusion can result from the adoption of such a construction of the Act.

In these actions the petitioners had a right of action against the Government under the law of the State of Missouri.[8] They have been paid for that alleged liability.[9] The actions were properly dismissed.

ARGUMENT

I.

By the provisions of the Federal Tort Claims Act the liability of the United States is determinable by application of the substantive law of the place wherein the actionable damage, injury, or death occurred.

The Federal Tort Claims Act contains several references to "the law of the place where the act or omission occurred." From the use of this expression it is evident that the Act may have been effected to designate a particular *choice of law*. Is it necessary and reasonable to conclude that this choice was an election between "the

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[7] Federal Tort Claims Act, 28 U.S.C., Section 1346(b).

[8] Wrongful Death Act of the State of Missouri, Title 36, V.A. Mo. S., Section 537.080.

[9] (R. 20-22).

law of the place where the act or omission occurred," within that expression's narrow, literal meaning, to be distinguished and differentiated from the law of the place where the damage, injury, or death occurred?

No provision of the Act rejects or excepts from the Act application of existing rules of conflicts of law to the liability of the Government under the provisions of local or state law.

The Act is not silent in this regard. There is no vacuum or ambiguity of Congressional requirement. To the contrary, it is expressly provided that the Government shall be liable "in the same manner and to the same extent as a private individual under like circumstances,"[10] excepting only a group of specific, delineated modifications to this ambit of liability. The list of exceptions contains no direct or indirect modification to existing principles of conflicts of law. They apply to the conduct of the Government "in the same manner and to the same extent" as to any private individual similarly situated.

From a reading of the Act in its entirety, without a narrow interpretation of scattered clauses of the Act to the exclusion of the remaining language, it is apparent that the Act adopts a standard of liability for the Government for certain negligent conduct of its employees. This negligence of "act or omission" is not reasonably to be deemed negligence in the abstract, or conduct without consequence; *it is implicit that the negligence be actionable.*

---

[10] Section 2674.

From the legislative history of the Act,[11] it is apparent that the inclusion of the language "law of the place of the act or omission" serves a distinctly different purpose than the selection of a new concept of conflicts of law. Its purpose was to punctuate a Congressional intention to ascribe the Government's liability to existing local or state law, and to unequivocally reject any notion of an intent to provide a new system of federal tort liability.[12]

It is only when one attempts to inject novel meaning into the language of the Act that any ambiguity is found. This is a process of isolating particular phrases of the language to the exclusion of the readily apparent purpose of the Act as read in its entirety. Fairly construed, the intent and meaning of *the choice of applicable law* is clear and concise.[13]

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[11] *Dalehite* v. *United States*, 346 U.S. 15, 24-30; *Feres* v. *United States*, 340 U.S. 135, 139-140; Hearings before the Committee on the Judiciary, House of Representatives, Seventy-Seventh Congress, Second Session, on H.R. 5373 and H.R. 6463.

[12] "It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." *Feres*, at page 141.

[13] Testimony before the House Committee on the Judiciary, Hearings, etc., in part reads (at page 30):

"Mr. Shea: • • • Under the other bill it was not specifically provided that local law should govern, and certain express provisions were made, for instance, as to distributions.

Mr. Celler: Do you need that? Is that necessary to express it?

Mr. Shea: *I should think the earlier bill would probably be construed as applying the local tort law, but this bill specifically covers it,* leaving the distribution in cases of death, etc., to the local law.

Mr. Celler: The only trouble is in future bills you may have to put that precedent in. If you leave it out the courts may not construe it should apply. I am only thinking out loud to get your reaction.

Mr. Shea: *This bill provides explicitly for the application of local law.*" (Emphasis supplied.)

In their brief petitioners cite segments of some of the testimony before the House Committee on the Judiciary,[14] testimony which, they argue, "reinforces" their interpretation of the meaning of the Act. They do take note of an indiscriminate variance in choice of language by the chief witness, the Honorable Francis M. Shea, then Assistant Attorney General of the United States. This testimony is here repeated solely for emphasis:

"Mr. Robsion: Where does claimant bring the suit?

Mr. Shea: The suit is to be brought in the district courts in the several districts.

Mr. Robsion: Where the claimant resides?

Mr. Shea: *Either where the claimant resides, or in the local[ity] of the injury or damage.*"[15] (Emphasis supplied.)

While petitioners argue that this testimony should be construed in the light of the question being addressed to a problem of venue, and not to a choice of law problem, that is fallacious reasoning.[16] The venue section of the Act is identical in this regard to the provisions waiving the immunity of the Government; this section provides that an action may be prosecuted "where the plaintiff resides or wherein the act or omission complained of occurred."[17]

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[14] Hearings, etc., *supra*.

[15] Hearings, etc., at page 9.

[16] This evidently was Judge Miller's conclusion in registering his dissent to the decision in the *Eastern Airlines* case; and ~~so~~ *one can determine the basis of the majority holding therein* because no majority opinion was filed upon this issue.

[17] Section 1402(b).

Does this indiscriminate inter-change of language signify a designed term of art; or does not this inter-play of words merely signify a lack of purpose or design to effect any modification to existing local or state rules of conflicts of law?

Petitioners say that the Assistant Attorney General was not addressing these particular remarks to a choice of law problem. While this is true, it is certainly pertinent to inquire exactly where in the legislative history of the Act is found any remark addressed to a problem of choice of rules of conflicts of law.[18] One may study this testimony in its entirety, read the remarks of Committee membership, and examine the complete legislative history leading to the adoption of the Act, without discovering any discussion, reference, or mention of a recognition of a conflicts of law problem or question. This should not be presumed to be mere oversight. Why should the Committee have considered a non-existent question? No attempt was being made to modify existing rules of conflicts of law; and, without such a drastic innovation, why should any new problem in that regard reasonably have been anticipated?

To the contrary, a study of the Congressional hearings, viewed in conjunction with the legislative history leading to the adoption of the Act, clearly indicates a Congressional intention not to modify the law applicable to the tort liability of the Government from that of a private indi-

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[18] Petitioners apparently do not recognize and distinguish the difference between a "*choice of law* problem" and a question of *choice of rules of conflicts of law*.

vidual under similar circumstances. The Government's tort liability, like that of a private individual, would exist by reason of the applicable law of the locale or state where the tort was committed or occurred—where the damage, injury, or death occurred—where actionable negligence occurred. Further testimony by the Honorable Francis M. Shea reads, in part:

> "Mr. Shea: * * * Claims arising in a foreign country have been exempted from this bill, H.B. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims *arising in this country*. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.
>
> Mr. Robsion: You mean by that any representative of the United States *who committed a tort in England* or some other country could not be reached under this?
>
> Mr. Shea: *That is right*. That would have to come to the Committees on Claims in the Congress."[19] (Emphasis supplied.)

When does a tort or claim "arise?" When is an act or omission "wrongful?" When there is a resultant damage, injury, or death—when such act or omission is actionable. These conclusions are implicit in the wording of the question by the Committee (*i.e.*, "any representative * * * who committed a tort in England") and the response of the Assistant Attorney General.

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[19] Hearings, etc., at page 35.

The irony of petitioners' contentions rests in their inconsistency. They ask this Court to adopt conflicting, contradictory rules of construction in interpreting segments of a singular phrase of the Act. Construction is requested of the phrase "law of the place where the act or omission occurred." On the one hand they argue that the term "law of the place" should be broadly interpreted to mean "only statutory[20] law, without regard to rules of conflicts of law;" on the other hand they urge a strict interpretation of the meaning of the remaining language "where the act or omission occurred," without reference to the context of that language in the Act.

That argument is self-defeating. Fairly construed, when viewed in context with the purpose and function of the Act, as fully disclosed in its legislative history, the use of the unqualified term "law of the place" is a clear and concise *reference to all law existing in the locale or state*, whether founded upon ordinance, regulation, statute, decision, constitutional provision, or the common law. It necessarily includes a reference to the rules of conflicts of law recognized under the "law of the place." When construed in that manner, the meaning of the remaining language of the phrase "where the act or omission occurred" is obvious and requires no complex interpretation. There is a technical distinction, without a cognizable difference, between a determination of liability by the substantive law of the place of the tort, as contrasted to the law of the place of the act or omission resulting in the

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[20] Petitioners seek recovery of damages "under the Oklahoma Wrongful Death Statute." (R. 5; Petitioners' Brief, at page 6.)

tort, including its rules of conflicts of law which automatically refer the determination of liability to the substantive law of the place of the tort. *Under either interpretation the Government's liability is determinable by application of the substantive law of the place of the damage, injury, or death.*

The particular construction of the Act being urged by petitioners would result in endless confusion to all concerned with a multi-state tort caused by negligence of the Government. While in the circumstances of this case the Government's negligence is alleged to have occurred only within the State of Oklahoma, it is common knowledge that a significant percentage of torts committed in this day result from the combined, concerted negligence of two or more joint tort-feasors. This Court will take judicial notice that the Government has two or more individuals in its current employ. If, therefore, party A be injured, damaged, or killed in State W as a direct consequence of the conjoint negligence of Government employees variously situated in States X, Y and Z—and assume further that each of the four states has significantly different provisions of substantive law otherwise applicable to the remedy of A—the law of which of the four states should be applied by the district courts under the Act by the interpretation urged by the petitioners? Patently there is no logical solution because that would be a result wholly unintended by the framers of this legislation; no procedure was expressly or impliedly provided in the Act for the handling of such a situation. By a proper construction of the Act, with no modification to existing rules of conflicts of law, the law of State W would be uniformly applicable to the Government's liability.

No useful purpose or reason exists for acceptance of petitioners' interpretation of the Act. Contrary to their argument, such a construction does not constitute a further limitation upon the liability of the Government, nor would it uniformly create any benefit to persons seeking redress against the Government. It would, on the other hand, create many additional problems for the district courts in their endeavors to attain a uniform application of the Act in Tort Claims litigation.

The decision of the Circuit Court in this case was in conformity with the views expressed herein. The Court first held that there is no statutory law of the State of Oklahoma giving rise to a right of action against the Government under the circumstances of the case. Judge Bratton recognized (at page 525 of the opinion) that the Wrongful Death Act of Oklahoma[21] "is limited in effect to wrongful deaths which occur in Oklahoma."

With the necessary realization that this was a result obviously unintended by Congress in its adoption of the Act, the Court then determined if a right of action existed under the law of Oklahoma when viewed in its entirety, including its applicable rules of conflicts of law. In this respect the Court found that petitioners' remedy, by application of the Oklahoma rule of conflicts of law,[22] had

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[21] Wrongful Death Act of the State of Oklahoma, Title 12, Okla. Stat., Section 1051, *et seq.*

[22] "Where an act of omission or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place." Page 523 of the opinion.

existed by virtue of the substantive law of the State of Missouri, the law of the place of the deaths. For the majority Judge Bratton observed (at page 525 of the opinion) that: "A transitory action for wrongful death occurring in another state may be maintained in the courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy."

The Circuit Court then concluded that such causes of action had become extinguished by reason of petitioners' previous full satisfaction under the Wrongful Death Act of the State of Missouri.[23]

CONCLUSION

The Circuit Court correctly recognized and held that in the circumstances of this case the law to be applied under the Federal Tort Claims Act, in determining the alleged liability of the United States of America, is the law of the state where the deaths occurred, the law of the State of Missouri. The petitioners having already received full recovery under the law of the State of Missouri, the actions were properly dismissed.

---

[23] Petitioners should not be heard to plead any hardship. They have never denied having had a cause of action against the Government under the substantive law of the State of Missouri; *nor can they deny having received a full recovery of damages under that law.*

The judgment of the Circuit Court should be affirmed, for which prayer is made.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

SUSANNE THOMAS RICHARDS, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	5
Argument	8
I. Section 1346(b) of the Federal Tort Claims Act must be interpreted to require that the liability of the United States be determined in accordance with the entire substantive law—including the conflict-of-laws principles—"of the place where the act or omission occurred" in order to satisfy the requirement of Section 2674 that the United States be liable "in the same manner and to the same extent as a private individual under like circumstances"	8
A. The government's position is supported by the language of the Federal Tort Claims Act	10
B. The government's position is also supported by the legislative history of the Federal Tort Claims Act	13
II. The purposes of the Federal Tort Claims Act would not be accomplished if Section 1346(b) were interpreted to require that the liability of the United States be determined in accordance with either the internal law of the place where the act or omission occurred or the internal law of the place where the injury occurred	21
III. Under Oklahoma law, petitioners are barred from asserting their claims under the Oklahoma Wrongful Death Act but are allowed to assert their claims under the Missouri Wrongful Death Act under which they have already received full satisfaction of their legal claims	25

615635—61——1

Page

Conclusion 27
Appendix 29

CITATIONS

Cases:

Alaniz v. *United States*, 257 F. 2d 108 18
Burkett v. *Glob Indemnity Co.*, 182 Miss. 423, 181 So. 316 24
Caldwell v. *Gore*, 175 La. 501, 143 So. 387 24
Dalehite v. *United States*, 346 U.S. 15 ..... 17, 18
Eastern Airlines, Inc. v. *Union Trust Co.*, 221 F. 2d 62, certiorari denied *sub nom. Union Trust Co.* v. *United States*, 350 U.S. 911 ..... 9, 10
Erie R.R. v. *Tompkins*, 304 U.S. 64 ..... 13, 22, 24
Fenton v. *Sinclair Refining Co.*, 206 Okla. 19, 240 P. 2d 748 27
Feres v. *United States*, 340 U.S. 135 19
Flora v. *United States*, 357 U.S. 63 11
Gochenour v. *St. Louis-San Francisco Ry.*, 205 Okla. 594, 239 P. 2d 769 ..... 26, 27
Hess v. *United States*, 361 U.S. 314 13
Hubbard v. *St. Louis & M.R.R. Co.*, 173 Mo. 249, 72 S.W. 1073 26
Kilberg v. *Northeast Airlines, Inc.*, Docket No. 222, New York Court of Appeals 25
Klaxon Co. v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 ..... 13, 22, 24
Landon v. *United States*, 197 F. 2d 128 9
Myers v. *Kennedy*, 306 Mo. 268, 267 S.W. 810 26
Olson v. *United States*, 175 F. 2d 510 18
Osaka Shosen Kaisha Line v. *United States*, 300 U.S. 98, 101 11
Plaza Express Co. v. *Galloway*, 365 Mo. 166, 280 S.W. 2d 17 26
Rayonier, Inc. v. *United States*, 352 U.S. 315 12
Schmidt v. *Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W. 2d 365 24
Slater v. *Mexican National R.R.*, 194 U.S. 120 23
United States v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301 21
United States v. *Marshall*, 230 F. 2d 183 10
United States v. *Spelar*, 338 U.S. 217 ..... 14, 17
Voytas v. *United States*, 256 U.S. 786 9

Statutes:

Federal Tort Claims Act: Page

28 U.S.C. 1346(b) 3, 5, 6, 7, 8, 9, 10, 11, 12, 17, 19, 20, 21, 22, 23, 24, 29

28 U.S.C. 1402(b) 3, 11, 29

28 U.S.C. (Supp. II) 2672 ..... 10, 29

28 U.S.C. 2674 ..... 5, 6, 7, 11, 12, 20, 21, 23, 24

28 U.S.C. 2675 11

28 U.S.C. 2676 11

28 U.S.C. 2680 (a) 11

28 U.S.C. 2680(b) 11

Legislative Reorganization Act of 1946, 60 Stat. 842, *et seq.*, Title IV 17

Sec. 410 20

28 U.S.C. 1332 12

Missouri Wrongful Death Act:

Mo. Ann. Stat. 537.080, R.S., Sec. 3653 (1939) 26, 31

Mo. Ann. Stat. 537.090, R.S., Sec. 3654 (1939) 3, 25, 26, 31

Mo. Ann. Stat. 537.090, R.S., Sec. 3654 (Supp. 1960) 26

Oklahoma Wrongful Death Act, 12 Okla. Stat. Ann. 1053 (Supp. 1960) 4, 26, 30

Miscellaneous:

69 Cong. Rec. 2192, 2193, 3118 18

86 Cong. Rec. 12024 18

86 Cong. Rec. 12032 15

88 Cong. Rec. 3174, 3175 17

71 Harv. L. Rev. 1351 24

Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess 15, 18, 19

Hearings on H.R. 7236 before Subcommittee No. 1 of the House Committee of the Judiciary, 76th Cong., 3d Sess 18

Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess 15, 18, 19

H.R. 14737, 65th Cong., 3d sess 14

H.R. 62, 67th Cong., 1st sess 14

H.R. 8651, 69th Cong., 1st sess 14

Miscellaneous—Continued

	Page
H.R. 9285, 70th Cong., 1st sess.:	
Sec. 201	14
Sec. 204	14
Sec. 205	14
H.R. 129, 73d Cong., 1st sess.:	
Sec. 2(f)	14
Sec. 2(g)	14
Sec. 3(a)	14
Sec. 4	14
Sec. 5	14
H.R. 7236, 76th Cong., 1st sess	15, 16
Sec. 201	14, 20
Sec. 204	15
Sec. 302	15
Sec. 304	15
H.R. 5373, 77th Cong., 1st sess	15, 16
H.R. 6463, 77th Cong., 2d sess., Sec. 301	15, 16, 17
H.R. 1356, 78th Cong., 1st sess	17
H.R. 181, 79th Cong., 1st sess	17
H. Rep. No. 2428, 76th Cong., 3d sess	15, 18
H. Rep. No. 2245, 77th Cong., 2d sess	17, 19
H. Rep. No. 1287, 79th Cong., 1st sess	17, 19
H. Rep. No. 308, 80th Cong., 1st sess	21
H. Rep. No. 748, 80th Cong., 1st sess	19
Restatement, Conflict of Laws, Sec. 377 (1934)	23
Reviser's Notes following 28 U.S.C. 2674	21
S. 1912, 69th Cong., 1st sess.:	
Sec. 201	14
Sec. 204	14
Sec. 205	14
S. 211, 72d Cong., 1st sess	14
S. 4567, 72d Cong., 1st sess.:	
Sec. 201(b)	14
Sec. 201(c)	14
Sec. 203	14
Sec. 204	14
S. 1043, 74th Cong., 1st sess.:	
Sec. 201	14
Sec. 203	14
Sec. 204	14

Miscellaneous—Continued

S. 2690, 76th Cong., 1st sess.: Page

Sec. 201 ..... 14, 20

Sec. 204 15

Sec. 302 15

Sec. 304 15

S. 2221, 77th Cong., 2d sess 16, 19

S. 1114, 78th Cong., 1st sess 17

S. Rep. No. 1196, 77th Cong., 2d sess 17

S. Rep. No. 1400, 78th Cong., 2d sess 19

S. Rep. No. 763, 80th Cong., 1st sess 19

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 20–22) is unreported. The opinion of the court of appeals (R. 39–46) is reported at 285 F. 2d 521.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1960 (R. 47). The petition for a writ of certiorari was filed on February 21, 1961, and was granted on May 8, 1961 (R. 48; 366 U.S. 916). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in an action under the Federal Tort Claims Act for wrongful death occurring in one State as a result of alleged negligence in another State the liability of the United States is to be determined in accordance with the internal law of the place of injury, the internal "law of the place where the act or omission occurred," or in accordance with the entire substantive law of the latter place, including its conflict-of-laws principles.

2. Whether the courts below were correct in holding that petitioners' complaints do not state claims upon which relief can be granted.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act, the Oklahoma Wrongful Death Act, 12 Okla. Stat. Ann. 1053, and the Missouri Wrongful Death Act, Mo. Ann. Stat. 537.080–537.090, R.S., Secs. 3653–3654 (1939), are set forth in the Appendix, *infra*, pp. 29–32.

STATEMENT

The fourteen separate claims in the present case arose out of the crash of an American Airlines plane at Fort Leonard Wood, Missouri, on August 4, 1955 (R. 7, 20).[1] The crash occurred while the plane was en route from Springfield, Missouri, to St. Louis,

[1] Except as to parties and damages sought, the pleadings in all cases are identical insofar as they relate to the pertinent issues (R. 20). For that reason, only the pleadings in Civ. No. 4272 of the district court have been printed in the record and are cited in this brief.

Missouri, as a part of a regularly scheduled flight from Tulsa, Oklahoma, to New York City (R. 7).

Petitioners alleged in their complaints that the crash had resulted from the outbreak of a fire in one of the plane's engines, and that the fire had been "caused by the failure of * * * [a] defective and unairworthy cylinder" which had been installed in the plane at the American Airlines overhaul base at Tulsa, Oklahoma (R. 7). Petitioners further alleged that the reason why a defective cylinder had been installed was that American Airlines had "engaged in unsafe practices in repair, rebuilding, overhauling and inspection of its aircraft, aircraft engines and component parts * * *," and that the United States, through the Civil Aeronautics Administration, had "negligently failed to enforce the terms of the Civil Aeronautics Act and the regulations thereunder which prohibited the practices then being used by American Airlines, Inc., in the overhaul depot of Tulsa, Oklahoma" (R. 6).

As the survivors or legal representatives of passengers and crew of the American Airlines' plane (R. 1–4), petitioners instituted their actions against the United States under the Federal Tort Claims Act (28 U.S.C. 1346(b), 1402(b), App., *infra*, p. 29) (R. 5). Although petitioners in each case had already received from American Airlines $15,000, the maximum amount then recoverable under the Missouri Wrongful Death Act (Mo. Ann. Stat. 537.090, R.S., Sec. 3654 (1939), App., *infra*, pp. 31–32) (R. 30–33),

they sought in their complaints additional amounts from the United States under the Oklahoma Wrongful Death Statute (12 Okla. Stat. Ann. 1053 (Supp. 1960), App., *infra*, pp. 30–31) (R. 5, 8). The United States filed third-party complaints against American Airlines, seeking reimbursement for any amount which petitioners might recover against the United States (R. 11–13).

After a pretrial hearing, the district court held that petitioners' complaints failed to state claims upon which relief could be granted under the Oklahoma Wrongful Death Act, since that statute did not apply "where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri" (R. 21). The court then noted that, "[i]f Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including its conflicts of law rule, is applicable thereunder," and that in this case the conflicts rule would refer the court to the Missouri Wrongful Death Act (R. 22). But, as to the Missouri statute, the court held that there was no claim upon which relief could be granted because the petitioners, by accepting $15,000 each from American Airlines, "have already received full satisfaction of any claims they might have thereunder" (R. 22). The court thereupon entered judgment dismissing petitioners' complaints with prejudice, and, because of its disposition, found it unnecessary to pass upon the third-party complaints.

The court of appeals, Chief Judge Murrah dissenting (R. 45–46), pointed out (R. 42) that, "in a case in which the act or omission occurs at one place and the resulting death at another," the Federal Tort Claims

Act equates "the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred"—in this case, the law of Oklahoma—and that the *substantive* law of that state included the conflict-of-laws rules as well. The court thereupon affirmed, reasoning in much the same manner as the district court that the complaints had failed to state claims upon which relief could be granted under either the Oklahoma or Missouri Wrongful Death Act (see R. 43, 44).

SUMMARY OF ARGUMENT

I

The parties in the present case, as well as five circuits, are in a three-way conflict as to which law is to be applied to determine the liability of the United States in a suit under the Federal Tort Claims Act. The government contends that the explicit language of Section 1346(b) of the Act requires that the liability of the United States be determined "in accordance with the law of the place where the act or omission occurred," and that Congress meant what it said when it used that language. To decide which law governs under the literal language of the statute, however, does not decide what the specific content of that law should be. Since Section 2674 of the Act provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances," the government believes that Section 1346(b) should be interpreted to refer to the entire substantive law,

including the conflict-of-laws principles, of the place where the act or omission occurred, for this is precisely what a federal district court, under its diversity-of-citizenship jurisdiction, would do with respect to a private litigant.

The legislative history of the Federal Tort Claims Act supports this position. The history makes clear that Congress made a deliberate choice of language in Section 1346(b). Moreover, although the history shows that Congress apparently never considered the conflict-of-laws problem created by multi-state torts, Congress did specifically indicate that it was not creating a separate system of federal tort liability, but rather that it was setting up a system by which the United States would be subjected to tort liability under existing local or state law, *i.e.*, under circumstances that would bring private liability into existence. Finally, the history makes clear that both Section 1346(b) and Section 2674 are to be read *in pari materia* so that the United States is to be held liable under the Act "in the same manner and to the same extent as a private individual under like circumstances" "in accordance with the law of the place where the act or omission occurred."

II

Petitioners' interpretation of the Act, that the liability of the United States should be determined in accordance with the internal law of the place where the act or omission occurred, ignores the requirement of Section 2674 that the United States is to be liable "in the same manner and to the same extent as a

private individual under like circumstances," for, under a federal district court's diversity-of-citizenship jurisdiction, the liability of a private individual would be determined in accordance with the whole law of the forum. Petitioners argue that the internal law of the place where the negligent act occurred should be given extra-territorial effect in order that it not impinge upon petitioners' claims created by federal law. But it is clear from the legislative history of the Act that Congress never intended to create a separate system of federal tort liability different from the liability existing under state law.

Respondent American Airlines' interpretation of the Act, that the liability of the United States should be determined in accordance with the internal law of the place of injury, completely ignores the specific language of Section 1346(b) that the liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred." Moreover, if the place where the act or omission occurred were to give extra-territorial effect to its law governing liability of a private individual, the airline's interpretation of the Act would not satisfy the requirements of Section 2674.

III

The practical effect of the government's position in the present case is that, under the entire substantive law of Oklahoma, "the place where the act or omission occurred," petitioners are allowed to assert their claims under the law of the place where the injury occurred—in this case, the Missouri Wrongful Death

Act. But, since petitioners have already received $15,000 each from American Airlines, the maximum recovery allowable under the Missouri statute, they have already received full satisfaction of their legal claims under the Missouri statute. Moreover, Oklahoma provides no alternative conflict-of-laws rule by which it gives extra-territorial effect to its own Wrongful Death Act in cases in which the negligent act occurs within its own borders even though the injury which causes death occurs outside the state. Petitioners have therefore failed to state claims upon which relief could be granted.

ARGUMENT

I

SECTION 1346(b) OF THE FEDERAL TORT CLAIMS ACT MUST BE INTERPRETED TO REQUIRE THAT THE LIABILITY OF THE UNITED STATES BE DETERMINED IN ACCORDANCE WITH THE ENTIRE SUBSTANTIVE LAW—INCLUDING THE CONFLICT-OF-LAWS PRINCIPLES—"OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED" IN ORDER TO SATISFY THE REQUIREMENT OF SECTION 2674 THAT THE UNITED STATES BE LIABLE "IN THE SAME MANNER AND TO THE SAME EXTENT AS A PRIVATE INDIVIDUAL UNDER LIKE CIRCUMSTANCES"

Section 1346(b) of the Federal Tort Claims Act (28 U.S.C. 1346(b), App., *infra*, p. 29) waives the sovereign immunity of the United States with respect to suit for a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred." All parties agree[2] that, under the language of Section 1346(b), the liability of the United States in a tort claims action must be determined "in accordance with the law of the place where the act or omission occurred." They part company, however, in defining what the content of that law shall be.

The government contends that Section 1346(b) must be interpreted as referring to the entire substantive law, including the conflict-of-laws principles, of the place where the act or omission occurred—in this case, the entire law of Oklahoma. Both the Tenth Circuit in the present case (R. 39–45) and the Second Circuit in *Landon* v. *United States,* 197 F. 2d 128, 131, adhered to this interpretation of Section 1346(b). American Airlines also argues this position in the alternative (Resp. Br. 10–11).

Petitioners, on the other hand, contend that Section 1346(b) specifically refers to the internal law of the place where the act or omission occurred—in this case, the internal law of Oklahoma (Pet. Br. 12, 25–28). They are supported in their position by the District of Columbia Circuit in *Eastern Airlines, Inc.* v. *Union Trust Co.,* 221 F. 2d 62, 80, certiorari denied *sub nom. Union Trust Co.* v. *United States,* 350 U.S. 911; by the Seventh Circuit in *Voytas* v. *United States,* 256 U.S. 786, 788–790; by Judge Frank of the Second Circuit, dissenting in *Landon* v. *United States,*

[2]Albeit American Airlines argues this position only in the alternative (see Resp. Br. 10–11).

supra, 197 F. 2d at 132; and by Chief Judge Murrah of the Tenth Circuit, dissenting in the present case (R. 45–46).

Finally, American Airlines, arguing in the alternative (see Resp. Br. 8–11), interprets Section 1346 (b) as referring to the law of the place where the "damage, injury, or death occurred" (Resp. Br. 9), *i.e.*, the law of the place where the act or omission had its operative effect—in this case, the internal law of Missouri. This interpretation is supported by the Ninth Circuit in *United States* v. *Marshall*, 230 F. 2d 183, 187, and by Judge Miller of the District of Columbia Circuit, dissenting in *Eastern Airlines, Inc.* v. *Union Trust Co.*, *supra*, 221 F. 2d at 80–81.

A. THE GOVERNMENT'S POSITION IS SUPPORTED BY THE LANGUAGE OF THE FEDERAL TORT CLAIMS ACT

1. The explicit language of Section 1346(b) requires that the liability of the United States be determined "in accordance with the law of the place where the act or omission occurred." The language employed is unequivocal. Congress could hardly have used any more precise language than it did in Section 1346(b). Nor did Congress confine the place of conduct language to Section 1346(b) alone. The same language is also used in other sections of the Tort Claims Act. Thus, Section 2672 (28 U.S.C. 2672, App., *infra*, pp. 29–30) authorizes administrative adjustments of certain claims "under circumstances where the United States * * * would be liable * * * in accordance with the law of the place where the act or omission occurred."

Section 2674 (28 U.S.C. 2674, App., infra, p. 30) prohibits the award of punitive damages even though "the law of the place where the act or omission complained of occurred provides * * *" punitive damages. Section 1402(b) (28 U.S.C. 1402(b), App., *infra*, p. 29) provides that a tort claims action may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." See also 28 U.S.C. 2675, 2676, 2680(a), 2680(b). Since it has long been a rule of statutory construction that, as a first reference, the most authoritative guide to the legislative purpose of a statute is the spontaneous and literal meaning of the language employed (see *Flora* v. *United States*, 357 U.S. 63, 65; *Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98, 101), the government can only agree with petitioners (Pet. Br. 15) that the "deliberate and consistent use of the same language throughout the Act can be squared only with the conclusion that Congress meant exactly what it said when it directed that the liability of the Government should be measured by the law of the place where the negligent act or omission of its employee occurred."

2. To decide which law governs the liability of the government under the literal language of the statute, however, does not decide what the specific content of that law should be. The government believes that Section 1346(b) should be interpreted to refer to the entire substantive law, including the conflict-of-laws principles, of the place where the negligent act oc-

curred.[8] Support for this position is found in the language of Section 2674 of the Act, which provides that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." As this Court stated in *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319: "[T]he test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the law of the State where the acts occurred." Thus, had the United States and American Airlines been sued in Oklahoma as joint tortfeasors, jurisdiction over the airline would have been based on diversity of citizenship (see 28 U.S.C. 1332), and jurisdiction over the United States would have been based on Section 1346(b) of the Tort Claims Act.

[8] The government's present position is a development of the position which it took in this Court in the *Union Trust Co.* case, *supra*. In that case the issue presented by the petition to this Court was whether the liability of the United States was to be determined by the *internal* law of the place where the act or omission occurred or by the *internal* law of the place where the injuries and deaths occurred. The government there took the same position it takes here as a starting point, namely, that the explicit language of Section 1346(b) requires that the liability of the United States be determined "in accordance with the law of the place where the act or omission occurred." Since the petition did not present the more refined issue whether it was the internal law or the entire substantive law which was to govern the liability of the United States, the government was not required to make any further elaboration or development of its position. In the present case, however, the precise issue, whether Section 1346(b) refers to the internal law or the entire substantive law, has been raised explicitly.

The court would have been required to determine the airline's liability, damages, and other questions in accordance with the entire substantive law of Oklahoma, the forum state, including its conflict-of-laws principles. See *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 478; *Erie R.R.* v. *Tompkins*, 304 U.S. 64. In order to determine the liability of the United States "in the same manner and to the same extent as a private individual under like circumstances," the court would have been required to look in the first instance, not to the internal law of Missouri, the place where the negligent act had its operative effect, and not to the internal law of Oklahoma, the place where the act occurred, but rather to Oklahoma's entire substantive law, including its conflict-of-law principles. Thus, as this Court stated in *Hess* v. *United States*, 361 U.S. 314, 318, n. 7: "[T]he term 'place' in the Federal Tort Claims Act means the political entity * * * whose laws shall govern the action against the United States 'in the same manner and to the same extent as a private individual under like circumstances.'"

B. THE GOVERNMENT'S POSITION IS ALSO SUPPORTED BY THE LEGISLATIVE HISTORY OF THE FEDERAL TORT CLAIMS ACT

1. It is clear from the legislative history that Congress made a deliberate choice of language in Section 1346(b), adopting the "law of the place where the act or omission occurred" and *not* the law of the place of injury.

The Federal Tort Claims Act was passed by the Seventy-Ninth Congress in 1946 after "some twenty-eight years of congressional drafting and redrafting,

amendment and counter-amendment." *United States v. Spelar*, 338 U.S. 217, 219–220. Most of the earlier tort claims bills proposed systems of compensation for personal injury or death to be administered by an employees' compensation commission.[4] Because these bills set up detailed provisions to govern such matters as the effect to be given contributory negligence or intoxication, aggravation of the injury through failure to secure medical care, and the order of the distribution of death benefits,[5] they did not contain any reference to any other law by which the liability of the United States was to be determined.

During the First Session of the Seventy-Sixth Congress, the whole emphasis with respect to government tort liability changed. In place of the elaborate administrative procedures and remedies proposed in the previous tort claims bills, the new measures, H.R. 7236 and S. 2690, established a right of suit against the United States in the "Court of Claims and the district courts" for property damages, personal injury, or death "caused by the negligence or wrongful act or omission" of government employees (Section 201). Just as in the earlier tort claim bills, H.R. 7236 and S. 2690 contained provisions barring recovery for injuries caused by contributory negli-

[4] See, *e.g.*, H.R. 14737, 65th Cong., 3d Sess.; H.R. 62, 67th Cong., 1st Sess.; H.R. 8651, 69th Cong., 1st Sess.; S. 211, 72d Cong., 1st Sess.; S. 1043, 74th Cong., 1st Sess.

[5] See, *e.g.*, S. 1912, 69th Cong., 1st Sess., Secs. 201, 204, 205; H.R. 9285, 70th Cong., 1st Sess., Secs. 201, 204, 205; S. 4567, 72d Cong., 1st Sess., Secs. 201(b), 201(c), 203, 204; H.R. 129, 73d Cong., 1st Sess., Secs. 2(f), 2(g), 3(a), 4, 5; S. 1043, 74th Cong., 1st Sess., Secs. 201, 203, 204.

gence, intoxication or willful conduct, establishing the order of distribution of death benefits, and governing aggravation of damages (Sections 204, 302, 304). Because of the change of emphasis in these new bills, the need for a reference to some law by which the liability of the United States was to be governed became apparent. Congress presumably contemplated that the liability would be determined by "the law of the situs of the alleged tort" (Hearings on S. 2690 before a Subcommittee of the Senate Committee of the Judiciary, 76th Cong., 3d Sess., p. 44), but did not make any specific reference in the bills to the law governing liability. H.R. 7236, after a favorable report following hearings by the House Judiciary Committee (H. Rep. No. 2428, 76th Cong., 3d Sess.), was passed by the House (86 Cong. Rec. 12032), but the Senate did not consider it before the close of the session.

In the First Session of the Seventy-Seventh Congress, the tort claims bill was reintroduced in the House as H.R. 5373 in virtually the identical form in which it had passed the House as H.R. 7236 in the preceding Congress. Between the First and Second Sessions, the Department of Justice, in cooperation with other government agencies, the American Bar Association, and Congressman Celler, proposed a revision of H.R. 5373 that was introduced in the House as H.R. 6463. See Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., pp. 1, 40–42. This revision, which was substantially adopted by the Committee, provided for the first time that the liability

of the United States was to be determined "in accordance with the law of the place where the act or omission occurred" (Section 301).

In discussing the revised bill, H.R. 6463, the draftsmen explained that the bill closely followed the pattern set out in H.R. 5373, 77th Cong., 1st Sess., and H.R. 7236, 76th Cong., 1st Sess., but "with two important exceptions." The first exception was that H.R. 6463 vested "exclusive jurisdiction in the district courts" instead of concurrent jurisdiction with the Court of Claims, because a district court "sits in only one State and is familiar with the local laws and decisions that are made pertinent to the determination of tort claims against the United States * * *." Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., *supra*, p. 42. The second major exception noted was that H.R. 6463 subjected (*id.*, p. 43 (emphasis added))

> the determination of the validity of the claim, the defenses thereto, and the distribution of the recovery, to *the law of the place where the delinquent act or omission occurred.* H.R. 7236 and H.R. 5373 *may*, as a matter of law, *have embodied the first of these requirements* to some extent, but the present bill states this explicitly, and leaves to the *local law* the determination of certain matters specifically treated in H.R. 7236 and H.R. 5373, such as the beneficiaries entitled to recovery in death cases, the defense of contributory negligence, and the like. * * *

S. 2221, 77th Cong., 2d Sess., the companion measure to H.R. 6463, was reported favorably by the

Senate Committee of the Judiciary (S. Rep. No. 1196, 77th Cong., 2d Sess.), and was then passed by the Senate (88 Cong. Rec. 3174, 3175). It was subsequently referred to the House Committee on the Judiciary which reported the bill favorably (H. Rep. No. 2245, 77th Cong., 2d Sess.), but it was never considered by the House. The bill, as revised by the Seventy-Seventh Congress, was subsequently reintroduced without substantial modification or further hearings in the Seventy-Eighth Congress (H.R. 1356, S. 1114, 78th Cong., 1st Sess.), without any action taken, and finally in the Seventy-Ninth Congress (H.R. 181, 79th Cong., 1st Sess.), where it was reported favorably (H. Rep. No. 1287, 79th Cong., 1st Sess.), and was finally passed as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842. See *United States* v. *Spelar, supra,* 338 U.S. at 220, n. 9. Thus, the language with respect to the law governing liability, which first appeared in Section 301 of H.R. 6463, 77th Cong., 2d Sess., was kept intact in every subsequent tort claims bill and was ultimately embodied in the present Federal Tort Claims Act as Section 1346(b).

2. It is also clear from the legislative history of the Tort Claims Act that Congress never considered the conflict-of-laws problems created by multi-state torts. This conclusion is confirmed by the Court's observation in *Dalehite* v. *United States,* 346 U.S. 15, 28, that "[u]ppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States

to tort liability is 'negligence in the operation of vehicles.'" And a perusal of the legislative history cited by the Court (*id.* at 28, n. 20) in fact indicates that the Congress discussed only cases involving accidents caused by the negligent driving of postal trucks, military vehicles, vehicles of the Civilian Conservation Corps, or the like,[6] which of course rarely give rise to any conflict-of-laws problem.

Since, in cases involving single-state torts, the place of the negligent act or omission, the place of the accident, and the place of the resultant injury or death are one and the same, it makes little difference whether a court interprets Section 1346(b) literally or interprets that section to require the imposition of liability on the United States in accordance with the law of the place where the accident, injury or death occurred; under either interpretation no conflict-of-laws problem arises. See, *e.g.*, *Olson* v. *United States*, 175 F. 2d 510, 512 (C.A. 8); *Alaniz* v. *United States*, 257 F. 2d 108, 110 (C.A. 10). Thus, throughout the lengthy history of the act, the term "law of the place where the act or omission occurred" was considered virtually synonymous with (1) "the law of the situs of the wrongful act or omission"[7]; (2) "local

[6] See Hearings on S. 2690, 76th Cong., 3d Sess., *supra*, p. 9; Hearings on H.R. 7236 before Subcommittee No. 1 of the House Committee of the Judiciary, 76th Cong., 3d Sess., pp. 7, 16; Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., *supra*, pp. 9, 12, 20, 33, 66. See also H. Rep. No. 2428, 76th Cong., 3d Sess., p. 3; 69 Cong. Rec. 2192, 2193, 3118; 86 Cong. Rec. 12024.

[7] Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., *supra*, p. 35; see *id.*, p. 43.

law"[8]; (3) "local tort law"[9]; (4) "the law of the situs of the alleged tort"[10]; (5) "the locale of the injury or damage"[11]; and even (6) "the law of the state where the death occurred."[12] The reason for this seeming disparity of language was no doubt that Congress concerned itself exclusively with single-state torts. Nevertheless, Congress made a deliberate choice of language in Section 1346(b) itself, adopting the "law of the place where the act or omission occurred."

3. Although Congress did not consider the problems arising out of multi-state torts, it did make clear that it was not creating a separate system of federal tort liability, as had been provided in the original tort claims bills (see *supra*, pp. 14–15); rather, it was setting up a means by which the United States would be subjected to tort liability under existing local and state law, *i.e.*, "under circumstances that would bring private liability into existence." *Feres* v. *United States*, 340 U.S. 135, 141.

Once the emphasis with respect to government tort liability changed in the First Session of the Seventy-

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[8] *Id.*, pp. 26, 27, 30, 43, 59, 61; S. Rep. No. 1196, 77th Cong., 2d Sess., p. 6; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 4; S. Rep. No. 1400, 79th Cong., 2d Sess., p. 32.

[9] Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., *supra*, p. 30.

[10] Hearings on S. 2690, 76th Cong., 3d Sess., *supra*, p. 44; see Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., *supra*, p. 43.

[11] *Id.*, p. 9.

[12] H. Rep. No. 748, 80th Cong., 1st Sess., p. 1; S. Rep. No. 763, 80th Cong., 1st Sess., p. 2.

sixth Congress from a system of elaborate administrative procedures and remedies to a system by which the United States would be subject to suit in the Court of Claims and the district courts (see *supra*, p. 14), the proposed bills embodied a provision, in the exact terms of present Section 2674, making the liability of the United States equivalent to the liability of a private individual, "subject to the provisions of this Act." H.R. 7236, 76th Cong., 1st Sess., Sec. 201; S. 2690, 76th Cong., 1st Sess., Sec. 201. This provision was kept intact in every subsequent tort claims bill and was ultimately enacted into law as Section 410 of the Legislative Reorganization Act of 1946, 60 Stat. 843.

As originally enacted, the provision in the present Section 2674, that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances," was made "[s]ubject to the provisions of this title," just as that provision had been made "subject to the provisions of this Act" for the first time in the tort claims bills introduced during the First Session of the Seventy-Sixth Congress. Since one of the provisions of the title was the provision, in present Section 1346 (b), that the liability of the United States was to be determined "in accordance with the law of the place where the act or omission occurred," both Section 2674 and Section 1346(b) were to be read *in pari materia*.

The clause, "[s]ubject to the provisions of this title," was deleted in the 1948 revision of the Federal Judicial Code. But the deletion was made solely for

the sake of phraseology, in pursuance of the policy of eliminating superfluous language, a policy which was followed throughout the code revision and which was not intended to effect any substantive change in the statute. See Reviser's Notes following 28 U.S.C. 2674; H. Rep. No. 308, 80th Cong., 1st Sess., pp. 5, 7; *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308–309.

Once Sections 2674 and 1346(b) are read *in pari materia*, it becomes clear that one of the basic purposes of the Act was to make "the United States * * * liable * * * in the same manner and to the same extent as a private individual under like circumstances" "in accordance with the law of the place where the act or omission occurred," and that the only way by which the purpose may be accomplished is to interpret Section 1346(b) as requiring that the liability be determined in accordance with the entire substantive law, including the conflict-of-laws principles, "of the place where the act or omission occurred."

II

THE PURPOSES OF THE FEDERAL TORT CLAIMS ACT WOULD NOT BE ACCOMPLISHED IF SECTION 1346(b) WERE INTERPRETED TO REQUIRE THAT THE LIABILITY OF THE UNITED STATES BE DETERMINED IN ACCORDANCE WITH EITHER THE INTERNAL LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED OR THE INTERNAL LAW OF THE PLACE WHERE THE INJURY OCCURRED

1. Petitioners' interpretation of the Act, that the liability of the United States should be determined in accordance with the *internal* law of the place where the act or omission occurred, ignores the requirement

of Section 2674 that the United States is to be liable "in the same manner and to the same extent as a private individual under like circumstances."[11] Had the United States and American Airlines been sued as joint tortfeasors in a federal district court in Oklahoma, the airline's liability would have been determined by Oklahoma's entire substantive law, including its conflict-of-laws principles, according to the well-known rule in diversity-of-citizenship cases established in the *Erie* and *Klaxon* cases, *supra*, whereas, under petitioner's theory, the liability of the United States would have been determined only by the internal law of Oklahoma.

Petitioners' position also presents another difficulty. Since the accident occurred in Missouri, the internal law of Oklahoma (the place where the negligent act occurred) would have to be given extra-territorial effect for petitioners to have recovery. But the Oklahoma courts have interpreted that state's own law as not having any extra-territorial effect (see *infra*, pp. 26–27). Petitioners therefore argue (Pet. Br. 29–33) that the territorial limitations on Oklahoma law should not be allowed to impinge upon their claims created by federal law. But as the legislative history

[11] Petitioners answer that "the Act itself clearly dictates that the remedy shall not, in every instance, be coextensive with that available against a private person" (Pet. Br. 20), and then present an illustration of "a few of the differences between a claimant's right to relief against the United States under the Act and his right to relief against a private individual under like circumstances * * *" (Pet. Br. 20, n. 20). But, as respondent American Airlines states (Resp. Br. 5): "The list of exceptions contains no direct or indirect modification to existing principles of conflicts of law."

of the Act indicates (see *supra*, pp. 16–17, 19), Congress never intended to create a separate system of federal tort liability different from the liability under existing state law. Furthermore, in wrongful death actions, this Court has always given effect to the limitations of liability imposed by the law which creates the cause of action. See, *e.g.*, *Slater* v. *Mexican National R.R.*, 194 U.S. 120, 126.

2. Respondent American Airlines contends that the liability of the United States should be determined in accordance with the internal law of the place of the injury, *i.e.*, the law of the place where the negligent act had its operative effect, because this is the normal conflict-of-laws rule. See Restatement, Conflict of Laws, Sec. 377 (1934). The airline further contends that, since, in a suit against a private individual, the ordinary conflict-of-laws rule would be applied, that rule should also be applied to the United States in order to give effect to the requirement in Section 2674 that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances" (Resp. Br. 5). Although this reasoning would lead to the same result in the instant case as the government's view, to accept the airline's interpretation would be to ignore the explicit language of Section 1346(b) that the United States is to be liable "in accordance with the law of the place where the act or omission occurred," and to construe Section 1346(b) in manner directly opposite to the ordinary and spontaneous meaning of the language used in that section (see *supra*, pp. 10–11).

Moreover, if the United States and the airline were sued as joint tortfeasors in a federal district court of the state where the negligent act occurred, and if that state gave extra-territorial effect to its law governing liability (cf. *Caldwell* v. *Gore*, 175 La. 501, 143 So. 387; *Schmidt* v. *Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W. 2d 365, 71 Harv. L. Rev. 1351; *Burkett* v. *Globe Indemnity Co.*, 182 Miss. 423, 181 So. 316), then the court, according to the *Erie* and *Klaxon* doctrine applicable in diversity cases, would look to the entire law of the state and apply that state's Wrongful Death Act extra-territorially to determine the airline's liability, whereas the court, according to the inflexible rule proposed by the airline, would look to the internal law of the state where the injury took effect to determine the liability of the United States under the Tort Claims Act. Under these circumstances, the United States would not be liable "in the same manner and to the same extent as a private individual under like circumstances."

3. In contrast to petitioners' and American Airlines' positions, the government's interpretation of the Tort Claims Act gives effect to the requirements of both Sections 1346(b) and 2674 and avoids the difficulties inherent in the positions of the petitioners and American Airlines. The government's position also avoids the difficult question raised by petitioners, *viz.*, whether, if the internal law of the place where the negligent act occurred is accepted as the controlling law, a federal court, enforcing a federal right, may ignore the territorial limitations of that law. It likewise circumvents another question

which is implicit in petitioners' position, *viz.*, whether, if the law of the place of the injury is accepted as the controlling law, a federal court, enforcing a federal right, may ignore the maximum recovery limitations of the law."

III

UNDER OKLAHOMA LAW, PETITIONERS ARE BARRED FROM ASSERTING THEIR CLAIMS UNDER THE OKLAHOMA WRONGFUL DEATH ACT BUT ARE ALLOWED TO ASSERT THEIR CLAIMS UNDER THE MISSOURI WRONGFUL DEATH ACT UNDER WHICH THEY HAVE ALREADY RECEIVED FULL SATISFACTION OF THEIR LEGAL CLAIMS

There is no dispute here, as there was none in the courts below, as to the pertinent facts: the "act or omission" of the United States, on which liability is predicated, is asserted to have occurred in Oklahoma (R. 6–7); the crash of the American Airlines plane, which injured and killed petitioners' decedents, occurred in Missouri (R. 7); and the petitioners in each case have been paid $15,000, the maximum amount recoverable under the Missouri Wrongful Death Act (Mo. Ann. Stat. 537.090, R.S., Sec. 3654 (1939), App., *infra*, pp. 31–32) (R. 30–33). The question is whether petitioners' complaints state claims for additional damages upon which relief can be granted against the United States under the Federal Tort Claims Act.

" In *Kilberg* v. *Northeast Airlines, Inc.*, Docket No. 222, New York Court of Appeals, the New York court recently applied the Massachusetts Wrongful Death Statute but refused to give effect to the limitations of liability imposed by that statute.

1. According to Oklahoma law, "[a]n action for wrongful death is based on the statute of the place where the injury occurred that caused the death" (*Gochenour* v. *St. Louis-San Francisco Ry.*, 205 Okla. 594, 597, 239 P. 2d 769, 772)—in this case, the law of Missouri. Under Missouri law, the Missouri Wrongful Death Act (Mo. Ann. Stat. 537.080, R.S., Sec. 3653 (1939), App., *infra*, p. 31) is the only basis for recovery. See, *e.g.*, *Plaza Express Co.* v. *Galloway*, 365 Mo. 166, 280 S.W. 2d 17. The maximum recovery then allowable under the Missouri law was $15,000 (Mo. Ann. Stat. 537.090, R.S., Sec. 3654 (1939)),[18] regardless of how many tortfeasors had a part in causing the wrongful death (see, *e.g.*, *Myers* v. *Kennedy*, 306 Mo. 268, 267 S.W. 810; *Hubbard* v. *St. Louis & M.R.R. Co.*, 173 Mo. 249, 72 S.W. 1073). Since in the present case it is conceded that petitioners have each received $15,000 from American Airlines (R. 30-33; see the Statement, *supra*, p. 3), petitioners have received full satisfaction for their legal claims under the Missouri statute.

2. Furthermore, Oklahoma provides no alternative conflict-of-laws rule by which it gives extra-territorial effect to its own Wrongful Death Act in cases in which the alleged negligent act occurs within its own borders, but the injury which causes death occurs outside the state. The Oklahoma Wrongful Death Act (12 Okla. Stat. Ann. 1053 (Supp. 1960), App., *infra*, pp.

[18] Subsequent to the incident here in dispute, the maximum amount recoverable under the Missouri Wrongful Death Act was raised prospectively to $25,000. Mo. Ann. Stat. 537.090, R.S., Sec. 3654 (Supp. 1960).

30–31) provides a remedy for wrongful death only if the *injury* which caused the death occurred within the borders of Oklahoma. See *Gochenour* v. *St. Louis-San Francisco Ry., supra; Fenton* v. *Sinclair Refining Co.*, 206 Okla. 19, 240 P. 2d 748. Since, in the present case, the injuries which caused the deaths occurred in Missouri, Oklahoma law precludes petitioners from recovery under the Oklahoma Wrongful Death Act. The courts below were therefore correct in holding that, in accordance with Oklahoma law, petitioners had failed to state claims upon which relief could be granted.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

FEDERAL TORT CLAIMS ACT

28 U.S.C. 1346(b) provides as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1402(b) provides as follows:

> Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U.S.C. (Supp. II) 2672 provides, in pertinent part, as follows:

> The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust,

determine, and settle any claim for money damages of $2,500 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674 provides as follows:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

OKLAHOMA WRONGFUL DEATH ACT

12 Okla. Stat. Ann. 1053 (Supp. 1960), provides as follows:

DEATH—ACTION FOR

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may main-

tain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased.

Missouri Wrongful Death Act

Mo. Ann. Stat. 537.080, R.S., Sec. 3653 (1939), provided prior to August 29, 1955, as follows:

LIABILITY FOR WRONGFUL DEATH GENERALLY

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

Mo. Ann. Stat. 537.090, R.S., Sec. 3654 (1939), provided prior to August 29, 1955, as follows:

DAMAGES FOR WRONGFUL DEATH, BY WHOM RECOVERABLE—AMOUNT

Damages accruing under section 537.080 shall be sued for and recovered by the same parties and in the same manner as provided in section 537.070; and in every such action

the jury may give such damages, not exceeding fifteen thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default.

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